

The long-term potential of an interim-solution
**An assessment of the EU's first and second generation bilateral competition
cooperation agreements in context**

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Wordcloud created in NVivo, based on the text of a selection of EU bilateral competition cooperation agreements.

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For Rajah.
May the perseverance and optimism that have led to the completion of this study inspire you.

English Summary

The international business environment is characterised by an international marketplace, regulated, however, by a plethora of national rules. Companies and transactions have become increasingly global in nature, but the (competition) rules governing their behaviour have not followed suit. The globalisation paradox entails that globalisation creates collective problems that should be addressed internationally, while at the same time the centralization of decision-making power and coercive authority (or a 'world government') which this would require is infeasible and undesirable. Other solutions to govern the global market are therefore needed. In the field of competition law, international cooperation can take many forms. This study focuses on one particular type of cooperation, namely bilateral enforcement cooperation via formal agreements that focus solely on competition matters. Bilateral enforcement cooperation agreements are often portrayed as being a mere 'interim-solution' awaiting a global agreement. This study therefore develops and applies benchmarks to measure the potential of these agreements to be more than just that, and to determine whether further development of such agreements is warranted.

Early proposals to create a global code were multilateral in nature, and integrated competition issues in a trade-context. These (overly) ambitious initiatives did not succeed, however, due to a lack of consensus within the international community, caused in part by a lack of understanding of the inherent complexities of the topic, as well as external factors. At the same time, however, the problems of unilateral extraterritorial enforcement became more apparent. Efforts were therefore aimed at creating informal multilateral guidance rather than hard international treaties. Such guidance, in turn, was then solidified in bilateral agreements. The EU's first generation cooperation agreements merely allowed cooperation to occur, rather than stimulating or requiring it. While they created momentum and in this manner played a valuable role, currently, the cost to negotiate such agreements is larger than the added benefits they would offer. The inherently unenforceable obligations 'imposed' by these agreements do not require a formal treaty. 'First generation' agreements can only resolve conflict when no true conflict is present, and do not create any cooperation discipline, thereby also limiting the efficiencies and rationalisations that could be achieved via cooperation. They can regain in importance if flesh is added to the bones of such agreements, their scope expanded, and more detailed follow-up of their implementation takes place. The EU has only recently concluded its first 'second generation' agreement, with Switzerland, which allows for the exchange of confidential information. Scrutiny of this agreement reveals significant flaws. Again transparency and cooperation discipline constitute areas of concern. The EU-Switzerland second generation agreement has overly addressed certain concerns in the form of excessively restrictive safeguards, as is the case with the protection of the leniency system, while remaining opaque on other crucial aspects, such as the delineation of the concept of confidential information and due process.

The EU's bilateral agreements do not operate in a void, and should be seen in their international context. They operate alongside many other diverse instruments of international cooperation. To determine the relative value of the EU's bilateral cooperation agreements, the 'dedicated' approach of agreements focusing solely on competition matters is contrasted with an 'integrated' approach, both substantially in the form of competition chapters in free trade agreements, and geographically, in the form of multilateral agreements. This study finds that competition chapters in free trade agreements have a useful role to play, in particular with regard to their reach and their potential to push for and lock-in domestic reforms. Competition chapters can therefore complement dedicated cooperation agreements since both serve inherently different goals. Caution is in place, however, as

trade and competition are two distinct policy fields pursuing different aims. Competition chapters may moreover be reduced to pawns in the game of issue-trading, and become subject to the challenges that come with concluding comprehensive trade agreements, such as the delays and obstacles paired with concluding a mixed agreement, and increased politicisation. With regard to geographical integration, this study advocates that the different multilateral forums should take advantage of their respective strengths by cooperating more, and the interplay between the multilateral and the bilateral spheres should be reinforced so that it becomes mutually reinforcing. While networks such as the OECD, UNCTAD, WTO, and the ICN can be considered as an exciting new form of global governance, issues of democratic accountability and transparency should not be ignored. Each forum has its demonstrated value, but this study also identifies particular challenges for each of them.

This dissertation shows that dedicated competition cooperation agreements are more than simply an interim solution. However, as they exist today their aptitude to become worthy tools of international cooperation is not realised. This dissertation concludes with some concrete suggestions to fulfil that potential. In implementing these suggestions lessons can be drawn from cooperation in other policy fields, such as tax policy or criminal law enforcement cooperation via mutual legal assistance agreements. Most importantly, additional empirical information is needed on the implementation of cooperation instruments, benchmarking reviews should become a standard aspect of the cooperation process, and more ambition is needed in the conclusion of bilateral agreements, as they form the ideal environment for testing novel approaches. Finally, international cooperation in a competition law context is in dire need of a grand strategy.

Nederlandse Samenvatting

De internationale economie wordt gekenmerkt door een mondiale markt, die echter gereguleerd wordt door een overvloed aan nationale wetten. Bedrijven en transacties hebben in toenemende mate een internationaal karakter, maar de (mededingings)regels die deze economische activiteit regelen zijn niet mee geëvolueerd. De globalisatieparadox houdt in dat terwijl globalisatie geleid heeft tot collectieve problemen die een globale oplossing vereisen, de centralisatie van beslissingsbevoegdheid en dwingende macht (een 'wereldregering') die hiervoor vereist zou zijn zowel onhaalbaar als onwenselijk is. Andere oplossingen zijn daarom noodzakelijk teneinde de globale marktplaats te ordenen. Internationale samenwerking binnen het mededingingsrecht kan vele vormen aannemen. Deze studie focust op één bepaald type samenwerking, namelijk bilaterale handhavingssamenwerking via formele akkoorden die enkel toegelegd zijn op mededingingsrecht. Bilaterale handhavingssamenwerking wordt vaak afgeschilderd als slechts een 'interim-oplossing', in afwachting van een globaal akkoord. Deze studie ontwikkelt daarom standaarden om het potentieel te meten van deze bilaterale akkoorden om meer dan een interim-oplossing te zijn, en past deze ook toe, teneinde te bepalen of het verder ontwikkelen van dergelijke akkoorden de moeite waard is.

De eerste inspanningen tot internationale samenwerking waren multilateraal van aard, waarbij mededingingsregels in een handelscontext geïntegreerd werden. Deze (over-)ambitieuze pogingen om een globale code te ontwikkelen slaagden echter niet in hun opzet, omwille van een gebrek aan consensus binnen de internationale gemeenschap, deels veroorzaakt door een gebrek aan inzicht in de inherente complexiteiten van dergelijke onderneming, alsook externe factoren. Tegelijkertijd werden de gebreken van de unilaterale extraterritoriale toepassing van nationaal recht duidelijk. Verdere inspanningen tot internationale samenwerking gingen daarom naar het creëren van informele multilaterale richtlijnen eerder dan bindende internationale verdragen. Deze richtlijnen werden dan op hun beurt opgenomen in bilaterale akkoorden. De 'eerste generatie'-akkoorden van de EU lieten samenwerking toe eerder dan het te stimuleren of vereisen. Ze creëerden momentum en speelden op deze manier een belangrijke rol. Momenteel ligt de kost van het onderhandelen van dit type akkoorden echter hoger dan de voordelen die deze bieden. De inherent onafdwingbare verplichtingen vereisen geen formeel bindend akkoord. Bovendien lijken eerste generatie-akkoorden enkel conflicten te kunnen oplossen wanneer er geen echte conflicten zijn, en creëren ze geen discipline in het samenwerkingsproces, waardoor potentiële efficiënties en besparingen worden beperkt. De akkoorden kunnen aan belang herwinnen indien de principes die ze nu bevatten meer uitgewerkt worden, hun inhoud wordt verruimd, en hun implementatie meer wordt opgevolgd. De EU sloot pas recent een eerste 'tweede generatie'-akkoord af met Zwitserland, dat toelaat om vertrouwelijke informatie te delen. Nauwkeurig onderzoek van dit akkoord legt significante zwaktes bloot. Opnieuw vormen transparantie en discipline in het samenwerkingsproces problemen. Het EU-Zwitserland tweede generatie akkoord is teveel tegemoet gekomen aan bepaalde zorgen via overmatig restrictieve vrijwaringsmaatregelen, bijvoorbeeld met betrekking tot de bescherming van de clementieregeling, terwijl het vaag blijft met betrekking tot andere cruciale aspecten, zoals bijvoorbeeld de definiëring van het concept 'vertrouwelijke informatie' en de procesrechten van de betrokkenen.

De bilaterale akkoorden van de EU functioneren niet in een leemte, en moeten daarom in hun context bekeken worden. Ze gelden naast verschillende andere samenwerkingsinstrumenten met geheel andere eigenschappen. Om hun relatieve waarde te bepalen wordt de 'gespecialiseerde' benadering van akkoorden die zich enkel op mededingingsrecht toelagen gecontrasteerd met een 'geïntegreerde' benadering, zowel inhoudelijk – in de vorm van mededingingshoofdstukken in

vrijhandelsakkoorden, als geografisch – de multilaterale fora. Mededingingshoofdstukken in vrijhandelsakkoorden vervullen een nuttige rol, voornamelijk wat betreft hun bereik, en het potentieel om binnenlandse hervormingen te promoten en te verzekeren. Op deze manier kunnen deze hoofdstukken bilaterale gespecialiseerde akkoorden aanvullen, aangezien beide verschillende doeleinden nastreven. Desalniettemin is voorzichtigheid op zijn plaats, want handel en mededinging zijn twee verschillende beleidsvelden met eigen doeleinden. Mededingingshoofdstukken riskeren bovendien gereduceerd te worden tot een extra pion in het onderhandelingsspel, en een slachtoffer te worden van de uitdagingen die gepaard gaan met het sluiten van een comprehensief vrijhandelsakkoord. Hierbij kan gedacht worden aan de vertragingen en obstakels die bij het sluiten van gemengde akkoorden kunnen komen kijken, en toegenomen politisering. Voor wat de geografische integratie betreft, pleit deze studie ervoor dat de verschillende multilaterale fora gebruik maken van elkaars sterktes door meer samen te werken, en de interactie tussen het multilaterale en het bilaterale niveau intensificeert, zodat een wederzijds versterkende relatie wordt gecreëerd. Netwerken zoals de OESO, UNCTAD, WTO en de ICN zijn veelbelovende vormen van globaal bestuur, maar problemen met democratische verantwoording en transparantie mogen niet genegeerd worden. Elk forum heeft aangetoonde waarde, maar wordt ook geconfronteerd met eigen uitdagingen zoals geïdentificeerd in deze studie.

Deze studie toont aan dat gespecialiseerde mededingingsakkoorden meer zijn dan louter een interim-oplossing. Hun potentieel om volwaardige instrumenten van internationale samenwerking te worden is vandaag echter niet vervuld. Deze dissertatie concludeert met enkele concrete suggesties om dit potentieel te verwezenlijken. Hierbij kunnen lessen getrokken worden uit samenwerking in andere beleidsvelden, zoals belastingbeleid of samenwerking via overeenkomsten betreffende wederzijdse rechtshulp. In ieder geval is meer empirische informatie nodig over de toepassing van samenwerkingsakkoorden, en vergelijkende analyses zouden een standaard-aspect van het samenwerkingsproces moeten worden. Bovendien moet er meer ambitie zijn bij het sluiten van bilaterale akkoorden, aangezien dergelijke akkoorden de ideale omgeving vormen om te experimenteren met nieuwe samenwerkingsvormen. Tenslotte is een overkoepelende strategie met betrekking tot internationale samenwerking in het mededingingsrecht hoogstnodig.

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List of Abbreviations

ACCC	Australian Competition and Consumer Commission
ACM	Netherlands Authority for Consumers and Markets
ACP	Africa, Caribbean, Pacific
AECLJ	Association of European Competition Law Judges
AIN	Advocacy and Implementation Network
AMC	Antitrust Modernization Commission
AmCham	American Chamber of Commerce
BCTT	Business Coalition for Transatlantic Trade
BIAC	Business and Industry Advisory Committee to the OECD
CartA	(Swiss) Cartel Act
CAT	UK Competition Appeal Tribunal
CCB	Canadian Competition Bureau
CETA	EU-Canada Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
CMA	UK Competition and Markets Authority
DCFTA	Deep and Comprehensive Free trade agreement
DG COMP	Directorate-General for Competition
DIAC	Draft International Antitrust Code
DoJ	Department of Justice of the United States of America
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECN	European Competition Network
ECOSOC	Economic and Social Council (of the United Nations)
ECSC	European Coal and Steel Community
ENP	European Neighbourhood Policy
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
FTC	Federal Trade Commission
FTAIA	Foreign Trade Antitrust Improvements Act
GATT	General Agreement on Tariffs and Trade
IAEAA	International Antitrust Enforcement Assistance Act (US)
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICN	International Competition Network
ICPAC	International Competition Policy Advisory Committee
ITO	International Trade Organisation
IPR	Intellectual Property Rights
JFTC	Japan Fair Trade Commission
KFTC	Fair Trade Commission Republic of Korea
MABRA	Mutual Assistance in Business Regulation Act (Australia)
MACMA	Mutual Assistance in Criminal Matters Act (Australia)
MLAT	Mutual Legal Assistance Treaty
Mofcom	Ministry of Commerce People's Republic of China

MoU	Memorandum of Understanding
NAFTA	North-Atlantic Free Trade Agreement
NCA	National competition authority
NGA	Non-Governmental Actor
NRP	New Rules of Procedure
NZCC	New Zealand Commerce Commission
OECD	Organisation for Economic Co-operation and Development
OFT	Office of Fair Trade
PCIJ	Permanent Court of International Justice
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
USC	United States Code
RFI	Request for Information
RTA	Regional Trade Agreement
SCM	Subsidies and Countervailing Measures
SOE	State-owned enterprise
TPP	Trans-Pacific Partnership
TTIP	Trans-Atlantic Trade and Investment Partnership
WEC	World Economic Conference
WTO	World Trade Organisation

Preface

When embarking on this research, the goal was not to write a theoretical piece on an ideal situation. When doing this research, input from ‘the field’, those actually creating and ensuring competition – be it companies, enforcers, or rule-makers – was as important as the underlying theories.

This work has been updated until 31 June 2017.

“The life of the law has not been logic, it has been experience.”²

² O. Holmes Jr., *The Common Law*, Boston, Little, Brown and Company, 1881.

Introduction: ready, willing, and able?

*"I want to start [...] with the question of why we are committed to international cooperation. It is the why, of course, that should inform the practice."*³

In 1998, DOUGLAS MELAMED, principal Deputy Assistant Attorney General of the United States' Department of Justice (DoJ) at the time, started his speech before the 25th Annual Conference of the Fordham Law Institute with the words: *"We live in a global economy, but we do not live in a global state."*⁴ This phrase sums up the root of the issues under scrutiny in this study, which is centred around the paradox that while companies and businesses are becoming increasingly global in nature, the (competition)⁵ rules governing their behaviour are not following this pattern.⁶ This is generally known as the 'paradox of global governance' or the 'globalisation paradox', in that globalisation creates collective problems that should be addressed on a global scale, while at the same time a world government in the form of a supra-national body is infeasible and undesirable, as it would fail to provide meaningful democratic representation and threaten individual freedoms.⁷ Indeed, while more global governance may be needed to address global concerns, such centralization of decision-making power and coercive authority would give rise to fears of unduly curtailed liberty and unaccountability of decision-makers.⁸ In the field of competition law, the emergence of international rules is limited. Instead, the international community is characterized by an expanding extraterritorial application of national and European laws.⁹ This multiplicity of legal orders governing competition issues has resulted in horizontal conflicts of jurisdiction. Such jurisdictional conflicts, resulting from a pluralism of sources of law, create a problem with regard to the legal paradigm applicable to how these legal sources should interrelate.¹⁰

In Europe, the discussions on the legal and practical issues that originate from this paradox began long before the EU's competition rules were inscribed in the Treaty of Rome, and took place in a diverse range of forums. The difficulty of having to operate in a multitude of legal orders was further complicated by the variety of cooperation instruments that arose across the globe in response to this particular environment, resulting in *"a complex web of differing levels of possible engagement between*

³ J. Wayland, "International cooperation at the antitrust division", remarks as prepared for the International Bar Association's 16th Annual Competition Conference, Florence, 14 September 2012.

⁴ A. Melamed, "Antitrust enforcement in a global economy" in B. Hawk, (ed.), *1998 Fordham Corporate Law Institute International Antitrust Law and Policy Conference*, New York, Fordham Corporate Law Institute, 1999, 1. He reiterated this statement in A. Melamed, "International Cooperation in Competition Law and Policy: What can be Achieved at the Bilateral, Regional, and Multilateral levels", *Journal of International Economic Law*, Vol. 2, No. 3, 1999, 424.

⁵ In this study, the terms 'competition' and 'antitrust' are used interchangeably.

⁶ M. Gal, "Review Essay: New Perspectives on International Antitrust", *The American Journal of International Law*, Vol. 106, 2012, 401.

⁷ A.-M. Slaughter, *A New World Order*, Princeton, Princeton University Press, 2004, 8, as explained in Pierre-Hugues Verdier, "Regulatory networks and their limits", Harvard John M. Olin Center for Law, Economics, and Business Fellow's Discussion Paper Series, Discussion Paper No. 22, 9/2008, (Later published as "Transnational Regulatory Networks and Their Limits", *The Yale Journal of International Law*, Vol. 34, 2009, 119.)

⁸ J. Fingleton, "Competition Agencies and Global Markets: The Challenges Ahead", in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 188.

⁹ M. Blauberger, "The Governance of Overlapping Jurisdictions. How International Cooperation Enhances the Autonomy of Competition Authorities", *Transtate Working Papers*, No. 102, Bremen, 2009, 1.

¹⁰ R. van Gestel, H.-W. Micklitz & M. Poiarés Maduro, "Methodology in the New Legal World", *EUI Working Papers LAW*, 2012/13, 15.

authorities.”¹¹ Even jurisdictions such as the US and the EU have difficulties proceeding towards true international cooperation on competition matters, despite the similarities in their (legal) culture, their advanced competition systems, and the existence of several formal and informal cooperation agreements.¹² This observation incites a certain curiosity and raises several questions with regard to the perceived difficulty to advance in this field.

While cooperation between antitrust authorities is taking place to a considerable extent, incentives to further engage can and must be improved. It is not a revolutionary statement that current cooperation instruments, such as Memorandums of Understanding (MoUs), bilateral agreements, free trade agreements with competition provisions (FTAs), regional agreements, or multilateral forums, while useful to a certain extent, are not optimal, and do not adequately address some common obstacles to advanced international cooperation.¹³ Results of a recent survey jointly undertaken by the OECD and ICN on international enforcement cooperation indicated that what is needed to increase incentives to cooperate are a clear legal and institutional setting for international cooperation, and increased awareness of the benefits of such cooperation.¹⁴ Additional clarity surrounding the necessity of cooperation and the legal framework is particularly valuable considering that the world today is characterized by volatility, uncertainty, complexity and ambiguity. What is needed to address the challenges of this environment are vision, understanding, clarity, and agility.¹⁵

Research question

BRETHERTON and VOGLER as well as others identified three dimensions of EU global actorness: capabilities, presence, and opportunity.¹⁶ The demands expressed above can, however, also be translated into three other necessary and strongly interlinked elements for effective and efficient international cooperation: readiness, willingness, and ability. Readiness in this context indicates owning the right capabilities as a state and as a competition agency to engage in effective competition law enforcement.¹⁷ A competition authority in particular will need a certain degree of maturity, as well as sufficient budget and trained staff, before it can engage in cooperation. Willingness refers to the relevant (political) actors having the right mind-set to engage in voluntary forms of cooperation or to comply with harder forms of law. Ability, finally, is interpreted as the availability of instruments allowing to engage in cooperation, and the absence of legal and practical obstacles.

¹¹ OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Background Note, DAF/COMP/GF(2012)6, 13 February 2012, 13. Also see M. Błachucki and S. Józwiak, “Exchange of Information and Evidence between Competition Authorities and Entrepreneurs’ Rights”, *Yearbook of Antitrust and Regulatory Studies*, Vol. 5, No. 6, 2012, 150.

¹² D. Wood, “Is cooperation possible?”, Luncheon Speech, *New England Law Review*, Vol. 34, No. 1, 109.

¹³ See, for instance, OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 55.

¹⁴ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 15. Further referred to as ‘the OECD/ICN Joint Survey’.

¹⁵ On the VUCA-concept, see N. Horney, B. Pasmore, & T. O’Shea, “Leadership Agility: A Business Imperative for a VUCA World”, available at http://www.ibicity.fr/blog/public/Leadership_Agility_-_HRPS_Reprint_Permission__revised_.pdf (accessed May 2015) and P. Kinsinger & K. Walch, “Living and Leading in a VUCA World”, available at http://www.powerofunderstanding.net/pdfs/living_leading_small.pdf (accessed May 2015).

¹⁶ C. Bretherton & J. Vogler, *The European Union as a Global Actor*, 2nd ed., New York, Routledge, 2006, 273 p. Also see D. Bouris, T. Schumacher (eds.), *The Revised European Neighbourhood Policy: Continuity and Change in EU Foreign Policy*, London, Palgrave Mcmillan, 2017, 306 p.

¹⁷ In this study the terms ‘competition authority’, ‘competition agency’, ‘antitrust authority’, and ‘antitrust agency’ will be used interchangeably.

It is on this final aspect of ‘ability’ that this study wishes to elaborate. International cooperation in the field of competition law takes many forms. It can happen on a bilateral, regional, or multilateral level. It can be formal or informal. It can focus on substantive harmonisation or on operational coordination. This multiplicity of forms and scopes renders an assessment of the usefulness of such instruments difficult. This study will attempt to do so by focusing on one small, yet prominently present aspect of cooperation, namely cooperation between the European Commission and competition authorities from third countries through dedicated competition cooperation agreements. Some choices have therefore been made in delineating the field of research.

A first choice that has been made is to focus on bilateral agreements, as opposed to multilateral and regional ones. The multilateral and regional cooperation efforts in the field of competition law are important developments worthy of analysis. However, this study chose to focus on bilateral initiatives, due to the observation that the diversity in legal instruments for bilateral cooperation does not coincide *prima facie* with the rather similar goals that are pursued by such tools, contrary to multilateral initiatives that have more outspoken distinct roles. Roughly put, the Organisation for Economic Cooperation and Development (OECD) focuses mainly on developed countries, The United Nations Conference on Trade and Development’s (UNCTAD) work is centred around developing countries, the International Competition Network (ICN) is a virtual network at agency-level, focusing on ‘all competition, all the time’, and the World Trade Organisation (WTO) is a binding platform dealing mainly with trade issues. Conversely, MoUs, dedicated competition cooperation agreements, competition law provisions in FTAs, policy dialogues, *etcetera* are used in parallel to attain bilateral competition law enforcement cooperation. The added value of each legal instrument and the ways in which their objectives differ is less apparent and it is therefore unclear why such a wide array of instruments is used in international competition cooperation. Apparently, the Commission itself is aware of this issue. According to one Commission official “[t]he Directorate-General for Competition of the European Commission (‘DG Competition’) is now [2010] adopting a more strategic approach towards international agreements tailoring the instrument to the real needs of the relationship and to facts such as the size and importance of the country’s economy, the intensity of the trade and investment relationship with the country concerned and the degree of maturity of its competition regime.”¹⁸ This seems to imply that the diversification of previous instruments was not caused by the need to tailor the agreements to the real needs of the relationship, raising questions on what the deciding factors were in such cases. Another remark that comes to mind when reading this statement is who defines the ‘needs’ of the relationship, what are these ‘needs’ and from who’s perspective are they seen? Again, a detailed analysis of dedicated cooperation instruments may provide some clarity. Multilateral forums for cooperation will be briefly discussed in Part III of this study, as bilateral agreements function in parallel with them, but they will not be the main focus of this work. Regional cooperation, understood as multilateral cooperation between countries that are geographically close, while generally valued highly, is left out of the scope of this study as well. The specific legal framework in which it occurs, as well as the important role played by the geographic proximity of the parties

¹⁸ E. Valle Lagares, “International Agreements Regarding Cooperation in the Field of Competition: The New Strategy of the European Commission”, *Journal of European Competition Law & Practice*, Vol. 1, No. 2, 2010, 155-156.

involved,¹⁹ does not make regional cooperation a suited subject of this study as experiences with it are diverse and difficult to generalise.²⁰

Cooperation in the field of competition law can relate to enforcement cooperation, but also to competition advocacy, joint attempts to design competition laws, or policy convergence.²¹ While cooperation on all these fields is valuable, a second choice that has been made is to focus on operational or enforcement cooperation rather than joint efforts on substantive matters (the latter relating to the actual content of the antitrust rules rather than their implementation). This cooperation was defined by the ICN and OECD as “*co-operation between international enforcement agencies in specific enforcement cases[...]*.”²² This covers international cooperation in the detection, investigation, prosecution and sanctioning of specific anti-competitive behaviour and the review of mergers.²³ Enforcement cooperation can range from policy discussions, to discussions on general orientations regarding investigations, consultations on the timeline of the investigation, the theory of harm, or potential remedies, the coordination of searches, raids or inspections, the exchange of (confidential) information, or even actively gathering information on behalf of another agency.²⁴ It often starts at an early stage in the investigation.²⁵ Other options are the sharing of leads or general discussions about investigative strategy, market information or witness evaluations. These actions contribute to the streamlining and focusing of an investigation.²⁶ Employing a middle-term perspective, enforcement cooperation appears to be a more realistic and urgent objective than deep substantive convergence (see below, Part I, 2.2). Moreover, harmonisation of substantive laws will have essentially no effect, if it is not accompanied by effective coordination of enforcement proceedings.²⁷ As FIRST put it: “*It is all well and good to speak of the general theories of antitrust, or to incorporate those theories in guidelines or in declarations, or even to put them into treaties or laws. But nothing gets attention like actual enforcement. Corporations are economic actors, run by people who respond to incentives, both positive and negative.*”²⁸ Enforcement cooperation is therefore at the heart of international competition law.

Third, emphasis is put on dedicated competition agreements, being agreements that focus solely on competition matters. Agreements which have as their main goal general approximation with the EU *acquis* are left out of the scope of this study. Examples of such agreements are (Stabilisation and)

¹⁹ Geographic proximity often implies a resembling socio-economic culture, as well as similar market players taking advantage of scale and scope economies in marketing, transport, technical service, etc. See M. Gal “International Antitrust Solutions: Discrete Steps or Causally Linked?” in J. Drexler, W. Grimes, C. Jones, R. Peritz, & E. Swaine (eds), *More Common Ground for International Competition Law?*, Cheltenham, Edward Elgar Publishing, 2011, 258.

²⁰ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 58. On regional integration agreements, also see J.P. Trachtman, “International trade: regionalism” in A. Guzman and A. Sykes (eds), *Research handbook in international economic law*, Cheltenham, Edward Elgar Publishing, 2007.

²¹ See OECD, International Co-operation – Stocktaking Exercise of the Competition Committee’s Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 39.

²² OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 7, fn 1.

²³ Ibid.

²⁴ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 5.

²⁵ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 7.

²⁶ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 13.

²⁷ D. Wood, “Is cooperation possible?”, Luncheon Speech, *New England Law Review*, Vol. 34, No. 1, 109.

²⁸ H. First, “The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law”, *Antitrust Law Journal*, Vol. 68, No. 3, 2001, 730.

Association agreements, Partnership and Cooperation Agreements, or Euro-Mediterranean agreements. These agreements may also contain competition provisions, but due to their very specific nature and aim, will not be analysed in the framework of this study. The choice to focus on dedicated competition agreements also results in the de facto exclusion of cooperation with developing countries in this study, as such agreements are not concluded with countries lacking an advanced competition law system. Another reason to focus on dedicated agreements, is that the ICN was widely applauded for dealing with ‘all competition, all the time’.²⁹ These agreements do more or less the same, but are less (publicly) applauded for doing so. Agreements that do not only deal with competition matters, but also with trade issues, are analysed in Part III of this study, due to their increasing relevance in the management plans of Directorate-General Competition of the European Commission (DG COMP) (see below, Part III, 1). As demonstrated by the graphics below, bilateral competition agreements are among the cooperation instruments most available to states (figure 1) and are used rather frequently (figure 2). The OECD/ICN Joint Survey showed that competition-specific instruments are valued as most relevant for cooperation, while noncompetition-specific agreements were perceived as least relevant.³⁰

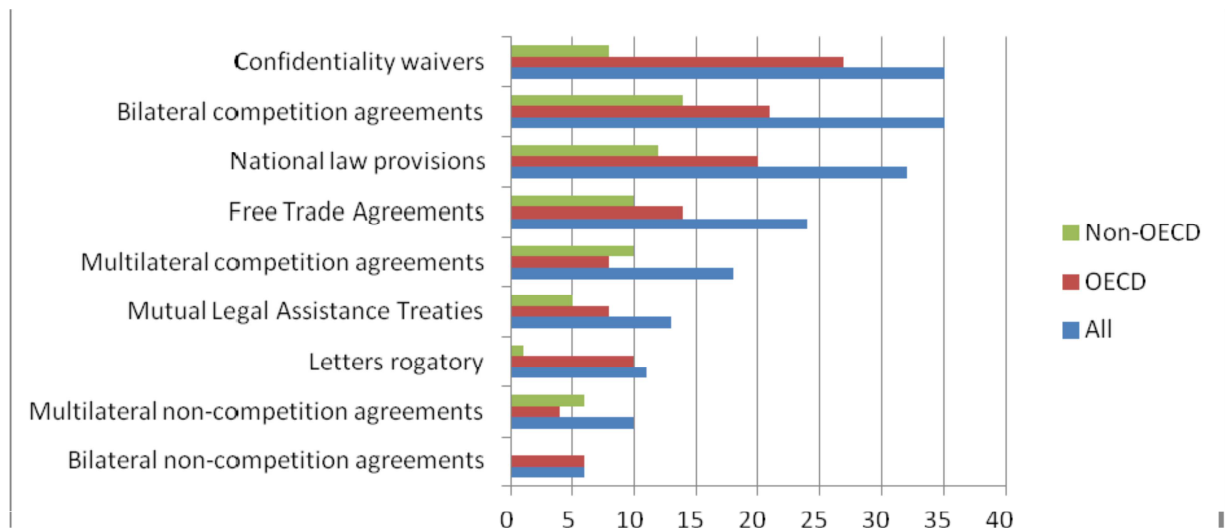


Figure 1: availability of legal bases for international cooperation (collecting data until 2012). Source: OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 38.

²⁹ ICN Factsheet and Key Messages, April 2009, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf> (accessed 12 May 2015).

³⁰ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 39, 42.

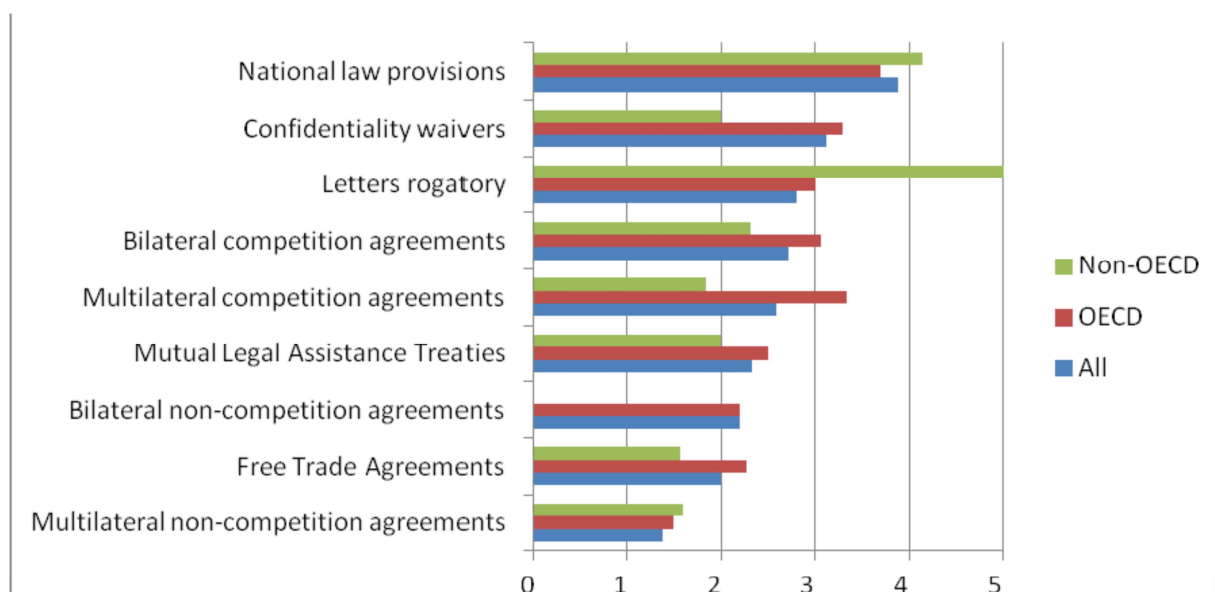


Figure 2: average score for 'Frequency of Use' of legal bases of co-operation (1: never to 5: frequently). Source: OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 40.

A final choice has been to focus on agreements concluded by the EU. The EU has developed one of the most mature competition regimes in the world. EU insights in international competition law cooperation are useful because competition law in the EU itself is applied transnationally. The EU has been very active in international negotiations on competition law and the internationalisation of competition law and policy.³¹ Finally, it is interesting to analyse the existence of a possible strategy of the EU with regard to dedicated competition agreements, as the EU has long been at the forefront of promoting the inclusion of competition matters in the framework of the WTO, but this has proven unsuccessful to date. This does not mean, however, that non-EU agreements will be completely ignored, as they form a rich source of inspiration. An example is the US-Australia second generation agreement allowing for advanced forms of cooperation.

In sum, this study examines whether and to what extent one particular type of legal instrument, so-called bilateral dedicated competition cooperation agreements, has contributed to the enhancement of international competition law enforcement. It is analysed whether bilateral enforcement cooperation agreements are useful, and whether they are more than just a 'stepping stone' to multilateral cooperation. The study analyses the main benefits and flaws of such agreements, in order to determine whether the EU should further invest in the negotiation and conclusion of such agreements. The aforementioned OECD/ICN Joint Survey revealed that while the legal basis for inter-agency cooperation can be twofold – either a direct legal basis for cooperation is provided by national laws, or these laws merely provide a mandate to enter into cooperation agreements – bilateral agreements are often concluded even by jurisdictions with laws directly permitting cooperation, suggesting that such have further utility.³² This study intends to clarify where this additional utility lays. By looking into the added value of dedicated competition cooperation

³¹ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 3-4.

³² OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 37.

agreements, a partial answer is provided to the question whether competition law enforcement is indeed ‘broadening and deepening’, as some suggest.³³

Methodology

The study departs from specified ‘research models’. Certain agreements were selected as research models for the type of agreement they represent, based on the importance of the concluding jurisdictions and/or the fact that they were the first of their kind and subsequent agreements only differed slightly from the original. It concerns first of all the 1991 EU-US first generation Agreement, which was the first ‘first generation agreement’ of the EU, secondly, the 1998 US-Australia second generation Agreement, being the first second generation agreement concluded by the US, and finally, the 2013 EU-Switzerland Agreement because it was the first (and so far only) second generation agreement concluded by the EU.³⁴ A functional comparative approach was employed by investigating how different jurisdictions, mainly the EU and to a certain extent the US, have reacted to the problem of existing in a global economy but not in a global state. As international competition consists of economical, legal, as well as political considerations, the study is necessarily interdisciplinary, combining elements of international relations studies, economics, and law, with a focus on the latter.

It is frequently acknowledged that it is difficult to assess international cooperation in a scientific way.³⁵ This is nevertheless the objective of this study, *albeit* focussing on only a particular aspect of international cooperation, namely enforcement cooperation via bilateral dedicated instruments. This study first of all employs the classical critical-analytical doctrinal approach. The classical approach consists of desk research of primary legal sources, case-law, and doctrine. In the taxonomy of international competition cooperation provisions that was developed by HOLMES *et al.* in the context of the Sixth Framework Programme of the European Commission, the authors recognised that their study - based on the text of the agreements – needed to be supplemented by studies of what is done in reality.³⁶ In order to answer to this call, qualitative research methods were applied in this study to complement the doctrinal research.³⁷ Observation and analysis of how the text of the law translates in practice was considered an important addition to the analysis of the ‘law on the books’. The aim of the qualitative research was to gather information on how competition officials and competition lawyers experience the usefulness of the dedicated competition agreements in their daily life when

³³ H. Dieckmann, “The Benefits of Cooperation between Competition Authorities”, presented at the Inaugural Symposium of the Competition Policy Research Center, Tokyo, 20 November 2003, 1-2, at <http://www.jftc.go.jp/cprc/DP/CPDP-9-E.pdf> (accessed December 2011).

³⁴ For the distinction between first and second generation agreements, see below, Part II, 1.1.

³⁵ See, for instance, F. Jenny, “International Cooperation on Competition: Myth, Reality and Perspective”, *The Antitrust Bulletin*, Vol. 48, Winter 2003, 984.

³⁶ P. Holmes, H. Müller, A. Papadopoulos, & A. Sydorak, “A Taxonomy of International Competition Cooperation Provisions”, paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 1.

³⁷ Sources used to gain background information on this methodologic approach include: J. Evers & F. de Boer, *The Qualitative Interview: Art and Skill*, The Hague, Eleven International Publishing, 2012; <http://www.statpac.com/surveys>; <http://www.surveysystem.com/sdesign.htm>; J. Billiet & H. Waeghe (eds) *Een Samenleving Onderzocht – Methoden van Sociaal-Wetenschappelijke Onderzoek*, Antwerpen, Uitgeverij De Boeck nv, 2003; J. Hochschild, “Conducting Intensive Interviews and Elite Interviews”, contribution to the Workshop on Interdisciplinary Standards for Systematic Qualitative Research, National Science Foundation, Arlington Virginia, 2005, available at: http://www.nsf.gov/sbe/ses/soc/ISSQR_workshop_rpt.pdf (accessed 8 May 2012); D. Richards, “Elite Interviewing: Approaches and Pitfalls”, *Politics*, Vol. 16, No. 3, 1996; R. van Gestel, H.-W. Micklitz & M. Poiares Maduro, “Methodology in the New Legal World”, EUI Working Papers LAW, 2012/13.

handling international cases, whether cooperation is truly as developed as it is presented to be, and to what extent this is due to the existence of such agreements. The goal was to gather depth and detail about the practical cooperation processes of the European Commission, and to nuance in which cases cooperation goes awry and where it is successful. The study gathers insight on how the officials of competition agencies interact with their international counterparts on a day-to-day basis and how dedicated competition agreements facilitate or obstruct this in the short and long term.

The qualitative approach was rather pragmatic. The methodological choices were guided by the research question, rather than theoretical considerations. Three separate methods were used. First, surveys were sent out to international law firms to gather information on their experience with international cartel cases, unilateral conduct cases, and merger cases.³⁸ Law firms were selected through theoretical sampling. The selection was based on the listing of the Legal 500 website. The top 25 competition law firms were contacted. Geographically the scope was limited to international law firms having an office in Brussels.³⁹ Within each law firm, surveys were sent to the partners specialised in competition law, asking them to fill out the survey or forward it to those whom they considered most suited to contribute to the survey. Social sponsoring was used where it was available: acquaintances and friends in the law firms were asked to spread and promote the survey. They were helpful in creating a cooperative environment. The survey and cover letter are included as Annex I to this study. It proved difficult to gather responses from law firms. Of the 25 law firms repeatedly contacted via e-mail and phone, responses were collected from five firms only. As this cannot be considered a representative sample, the data collected are used in a mere illustrative way. Rather than a lack of willingness, it was indicated by some firms that data gathering within the firm, so called 'mapping' of firm activities, either did not happen, or is kept secret.

The second source of qualitative information consisted of elite interviews.⁴⁰ The choice of respondents occurred via criterion based sampling. European Commission officials (within DG COMP) that were involved in either the negotiation or implementation of the dedicated competition agreements, as well as participants of relevant OECD bodies and officials from national competition authorities were interviewed. Gatekeepers blocked access to these people to a certain extent, but the so-called snowball method did facilitate contact (by not only asking respondents whether they might know other people that may be relevant for this research, but by also asking for an introduction). Within DG COMP, a distinction was made between the actual case handlers, and their direct and indirect superiors. This approach informed not only about the implementation of the agreements, but also about how the vision of implementation might differ according to the step on the professional ladder: are the ones negotiating the agreements aware of the same problems as those in the case-teams? In total 17 officials were interviewed. While this number is not statistically significant, it does provide a credible image of international competition cooperation in practice.

Inspired by the grounded theory method, some open and explorative interviews were held.⁴¹ Only individual interviews were conducted, considering the sensitivity of the topic, to create an

³⁸ The survey was designed to be as user-friendly as possible, and respondents were given the choice as to which manner of response they preferred (orally or in writing).

³⁹ <http://www.legal500.com/>.

⁴⁰ 'Elite' in this context refers to respondents that were chosen due to their particular function, rather than anonymously or randomly. See J. Hochschild, "Conducting Intensive Interviews and Elite Interviews", contribution to the Workshop on Interdisciplinary Standards for Systematic Qualitative Research, National Science Foundation, Arlington Virginia, 2005, available at: http://www.nsf.gov/sbe/ses/soc/ISSQR_workshop_rpt.pdf (accessed 8 May 2012), 124.

⁴¹ The grounded theory method is a qualitative data analysis method, often used in social sciences.

atmosphere in which respondents feel they can speak freely. Interviews were thematic as it was not the complete day-to-day experience of a competition official that was relevant, but only their international cooperation habits. The structure of the interviews followed the tree-and-branches model. This approach takes into account the strengths and weaknesses of the interviewer, while also preventing the interviews to get off track or to reach deadlock. In other words, a directive type of interview was used, in order to avoid having the interviewees lead the interview and talking about their preferred topics too much, staying away from the sensitivities that this study wishes to uncover (without of course cutting off the possibility to discover new issues brought up by the respondents). An interview according to the opening-the-locks method might carry this risk, especially as elite-interviewing implies that often a single chance and little time is granted. The interviews conducted were a mix of both formal and informal interviews. During the formal interviews an interview protocol – the main questions written down verbatim – and an interview schedule were used, in order to keep focus. Questions are included as Annex II. Recording was not allowed or possible in the majority of cases. Jottings were therefore used during or right after the interview and impressions and answers were written down more elaborately as soon as possible after the interview took place. With regard to the form and place of the interview (in person/by phone/via Skype) respondents were offered the choice, in order to encourage participation, catering to the agendas of the respondents. Interviews conducted face-to-face occurred most. The interview questions were mostly of an open nature. Care was given to the neutrality of the questions, although some more provocative questions were used in order to trigger a reaction. Elicitation techniques were not used. As preparation is essential the interviews have only taken place after the desk-research was in an advanced stage. Evidently interviewees provide a subjective account of certain events and are no guarantee to establishing a positivist kind of ‘truth’.⁴² This was, however, not the goal of the interviews, its function is was to provide some insight into the mind-set of the actors dealing with the scrutinised legislation in practice and to draw from their experience.

The final qualitative method used for the research was the ethnographic method. By participating in the daily life of EU competition officials via a *stage atypique* at the European Commission, it was experienced first-hand how the European Commission cooperates with other agencies. The stage took place from the 5th of January until the 31st of March 2015 within the International Relations Unit (A5) in the Policy Directorate of DG COMP. Many of the interviews took place during the internship. Three months proved sufficient to be involved in a variety of tasks within the Unit and to gain a clear understanding of the daily work.

Relevance

Importance of international competition cooperation

The relevance of this research naturally draws from the relevance of international cooperation on competition matters as such. Judge DIANE WOOD described international antitrust as “*dealing with the future of the world economy itself*.”⁴³ Today, effective enforcement of national competition rules often depends upon assistance granted by foreign agencies or states.⁴⁴ The emergence of the global market

⁴² D. Richards, “Elite Interviewing: Approaches and Pitfalls”, *Politics*, Vol. 16, No. 3, 1996, 200.

⁴³ D. Wood, “Is cooperation possible?”, Luncheon Speech, *New England Law Review*, Vol. 34, No. 1, 103.

⁴⁴ For final decisions adopted by the EU in the period 2010-2011 international cooperation took place in 50% of merger cases where cooperation could be reasonably expected, 60% of cartel decisions, and 33% of unilateral conduct cases. (Internal Commission document, 2013, on file with author.) More generally recent OECD data showed that from 2007 to 2012, international cooperation has increased by 15% in cartel cases, 35% in merger review cases, and 30% in

necessitates the creation of rules adapted to a globalised context, detached from territorialism. As protectionist influences often obstruct this type of evolution, cooperation to simplify 'international' enforcement of 'national' rules is necessary.

Bilateral agreements have something to prove

Bilateral cooperation agreements are often depicted as 'stepping-stones' towards more advanced cooperation, or 'interim solutions' until a more broad international consensus arises.⁴⁵ The European Parliament in its resolution on EU cooperation agreements on competition policy enforcement explicitly stated that the Council and the Commission should promote bilateral second generation agreements "*while multilateral cooperation is not fully operational.*"⁴⁶ Such an 'interim' approach can be placed in the context of the 'building block theory', which is a manifestation of political consensus-building in public choice theory. This theory puts forward that limited areas of consensus will merge into a larger agreement via negotiations and trade-offs.⁴⁷ While this is indeed the case in some instances, it seems to be less so in the field of competition law. Bilateral competition agreements are generally only concluded with partners that have very similar competition law systems. The consensus that is formed in such a way is therefore not easily transposed to a multilateral level. It is unlikely that a broader international consensus will emerge in the near future. Discussions on international competition law have been taking place as early as 1927.⁴⁸ Negotiations under the WTO took place for close to ten years, without result.⁴⁹ Indeed, competition law remains a national phenomenon to a large extent. KARAMANIAN stated in 2002 that "[e]fficiency and harmonization are almost as elusive today as they were in the early 1970s."⁵⁰ Although this is a controversial statement, it is true that competition law is characterised by strong historical, economic, political, and social roots, making it "*a market nation's ultimate form of public law,*"⁵¹ and thus a difficult subject of compromise. It is therefore relevant to study the so-called 'interim' solution and how it can be optimized, as it might be a more permanent solution than originally envisaged. TERHECHTE asked the question whether a 'unified law' in the sense of a coherent multilateral treaty would be imaginable or whether the future

unilateral conduct cases. It is added that "*the number of opportunities for cooperation has probably increased much more than the actual incidence of cooperation.*" (OECD, Challenges of International Co-operation in Competition Law Enforcement, 2014, available at <http://www.oecd.org/competition/challenges-international-coop-competition-2014.htm>, accessed March 2015, 15.) The OECD further specified that 'in recent years' 90% of fines against cartels by the US authorities have been international, while the number of cartel cases involving an EU and a non-EU party had increased by more than 450% since 1990. Mergers and acquisitions with a cross-border dimension have increased about 250-350% in the same period. (OECD, Challenges of International Co-operation in Competition Law Enforcement, 2014, available at <http://www.oecd.org/competition/challenges-international-coop-competition-2014.htm>, accessed March 2015, 5.)

⁴⁵ See for instance C. Wallace, "Extraterritorial Discovery: Ongoing Challenges for Antitrust Litigation in an Environment of Global Investment", *Journal of International Economic Law*, Vol. 5, No. 2, 2002, 392.

⁴⁶ European Parliament Resolution on EU cooperation agreements on competition policy enforcement – the way forward, 2013/2921(RSP), 5 February 2014, paragraph 10.

⁴⁷ M. Taylor, *International Competition Law: a New Dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 128.

⁴⁸ In the context of the World Economic Conference. The first national competition laws date back to 1889 (Canada) and 1923 (in Europe - Germany).

⁴⁹ Starting with the 1995 Report of the Group of Experts and the First Ministerial Conference of the WTO in Singapore in 1996, and ending with the exclusion of competition issues from the Doha-agenda in 2004. See below, Part I, 3.3.3.

⁵⁰ S. Karamanian, "Book Review: An International Antitrust Primer: a Guide to the Operation of the United States, European Union, and Other Key Competition Laws in the Global Economy", *The American Journal of International Law*, Vol. 96, 2002, 1012.

⁵¹ S. Waller, "The Internalization of Antitrust Enforcement", *Boston University Law Review*, Vol. 77, No. 2, 1997, 395, as cited in M. Blauburger, "The Governance of Overlapping Jurisdictions. How International Cooperation Enhances the Autonomy of Competition Authorities", *Transtate Working Papers*, No. 102, Bremen, 2009, 11.

will rather depend on the observance of different regimes in this field and their interaction.⁵² This study believes that the second option is the correct answer to that question, and looks into how this interaction can successfully take place.

Change of EU focus

One reason why bilateral agreements on competition matters are often called an ‘interim solution’ is that the EU has consistently promoted a binding multilateral approach towards competition cooperation. Moreover, the EU wanted to include competition in a trade context. Indeed, throughout the nineties and until the collapse of the WTO talks in 2003, the EU formally supported the adoption of a binding WTO multilateral agreement including competition provisions (see below, Part I, 3.3.3.1).⁵³ In other words, the initial ambitions of the EU were entirely the opposite of bilateral dedicated competition agreements. It is only after the collapse of the WTO negotiations that the EU reluctantly diverged from this path. PAPADOPOULOS concluded that the EU’s approach towards bilateral enforcement cooperation agreements has been neutral at best, and that depending on the type of agreement, the role of the EU in the formation and application of such agreements varied.⁵⁴ The question could be asked, however, whether the EU’s track record in this regard truly reflects neutrality, or rather points to an inherent limitation of this type of agreement. Another open question is that in case it is a neutral stance, whether there is reason to believe that the EU will continue on this path in the future. Is the EU now fully dedicated to the bilateral option, or is it still considered a gap-filler until the binding multilateral option is again on the table?

Little data available

Information on (the implementation of) bilateral cooperation agreements in the field of competition law is scarce. This becomes even more apparent when compared to the follow-up that multilateral initiatives receive, where frequent reports narrate the accomplishments of diverse initiatives. While the effects of bilateral agreements might be less tangible than the recommended practices or guidelines issued by multilateral bodies, it is nevertheless possible to provide more detail on what has been accomplished under the agreements and in which cases meaningful cooperation took place. Concrete numbers on international competition cooperation could originally be found in the Commission’s Annual Reports to the Council and the European Parliament on Bilateral Cooperation in Competition Policy and in the Annual Reports on Competition Policy. However, from 2006 onwards, these reports no longer mention such data, and according to BLAUBERGER the Commission could not provide the data upon request.⁵⁵ Why this information is no longer available, be it low priority or redundancy due to the proclaimed commonality of cooperation, is unclear.

Other documents only provide general information on the frequency and quality of international cooperation in competition matters. Examples include the work of the OECD’s Competition Committee. Many countries do not seem to consider the collection of data as a priority. For instance,

⁵² J. Terhechte, *International Competition Enforcement Law Between Cooperation and Convergence*, Heidelberg, Springer-Verlag, 2011, 70.

⁵³ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 62.

⁵⁴ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 62, 265.

⁵⁵ M. Blauburger, “The Governance of Overlapping Jurisdictions. How International Cooperation Enhances the Autonomy of Competition Authorities”, Transtate Working Papers, No. 102, Bremen, 2009, 8, footnote 11.

in its contribution to the Global Forum on Competition ‘improving international co-operation in cartel investigations’, the US often neglected to answer (fully or exactly) the questions that were asked, which is regrettable as it presented an opportunity to provide transparency about the cooperation habits of one of the most important competition authorities in the world. Also in the reports of Working Party Three of the OECD terms such as ‘routinely’ or ‘increasingly’ are used, which ultimately provide the reader with little concrete information.⁵⁶ While OECD and ICN surveys generally enjoy a relatively large response rate, the information they disseminate remains quite vague and generalist. The report following the OECD/ICN Joint Survey confirmed that information on international cooperation is not systematically gathered by respondents (especially in the case of informal cooperation).⁵⁷

Several reasons may explain why relatively little information is available about the implementation of bilateral cooperation agreements in competition matters. A first explanation is that while bilateral competition cooperation agreements have been lauded as contributing to the efficiency of competition enforcement and reducing conflicts and disputes,⁵⁸ it is acknowledged at the same time that the real impact of such agreements is difficult to assess because of the confidentiality of intergovernmental/interagency discussions and the mediatisation of failure rather than success.⁵⁹ JENNY correctly admitted that it is very difficult to find reliable data on whether case-specific cooperation has indeed progressed between parties to bilateral or regional agreements, and whether these instruments have been useful tools of cooperation. Indeed, *“the reality and measurable importance of international cooperation agreements in competition law enforcement remain to a large extent unknown.”*⁶⁰ JENNY continued that based on the information that is available, in the assumption that this information is correct, the importance of cooperation on competition enforcement may be overestimated, at least with regard to case-specific cooperation. He pointed to the plausible scenario that competition officials have pictured their cooperation efforts rosier than is the case.⁶¹ Indeed, speeches and publications on the subject of international competition law enforcement generally tend to be rather general in nature and paint an overly positive picture.⁶² Statements such as the following, by former FTC chairman PITOFKY, are alarming: *“In my view, it is hard to imagine how day-to-day cooperation and coordination between enforcement officials in Europe and the United States could be much improved. Within the bounds of confidentiality rules, we share on a regular and continuing basis, views and information about particular transactions, coordinate the timing of our review process to the extent feasible and almost always achieve consistent remedies.”*⁶³ Not only are statements like this testimony of a weakened ambition towards continuous improvement, this type of optimism about the current state of international competition cooperation might be aimed at discouraging attempts to create a more formal cooperation mechanism that would

⁵⁶ For instance *“Indeed, parties to merger investigations routinely waive statutory confidentiality protections to facilitate inter-agency cooperation, and increasingly are doing so in unilateral conduct investigations.”* (OECD, Discussion on International Co-operation, Contribution of the United States, DAF/COMP/WP3/WD(2012)24, 12 June 2012, 4.

⁵⁷ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 47, 74.

⁵⁸ See http://ec.europa.eu/competition/speeches/index_theme_22.html (accessed May 2015).

⁵⁹ E. Swaine, “Cooperation, Comity, and Competition Policy: United States” in A. Guzman (ed.), *Cooperation, Comity, and Competition*, New York, Oxford University Press, 2011, 16.

⁶⁰ F. Jenny, “International Cooperation on Competition: Myth, Reality and Perspective”, *The Antitrust Bulletin*, Vol. 48, Winter 2003, 988.

⁶¹ *Ibid.*, 988, 1001.

⁶² ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 6.

⁶³ R. Pitofsky, “EU and US Approaches to International Mergers – Views from the US Federal Trade Commission”, Remarks before the EC Merger Control 10th Anniversary Conference, Brussels, 14 September 2000.

decrease the discretionary power of the antitrust agencies, and might also serve to protect antitrust agencies from criticism by the business community or other governmental bodies.⁶⁴ Others have claimed that US optimism regarding cooperation is merely a strategy to steer away from harmonisation efforts.⁶⁵ An additional cause for the scarceness of information is that despite the fact that at present over a hundred countries, meaning more than half of the world, have adopted competition laws, most of these countries have only done so in the last twenty years.⁶⁶ The fact that these competition systems are very young also affects how much information is available.

More data are needed, however, because the usefulness of bilateral cooperation agreements is often questioned by the statement that they basically formalise what can be done, and what is done, informally.⁶⁷ The agreements are also criticised for their lack of binding power, more precisely the fact that they do not provide a mechanism for resolving conflicts (for instance by means of a choice of law provision or via a dispute settlement body), and consequently allegedly cannot overcome the test of hegemony and ethnocentrism.⁶⁸ A deeper analysis of these agreements might help alleviate such criticisms, or on the contrary provide evidence for them. It would be an added value to inform the general public, and the business world in particular, of how, and how intensely, international competition cooperation takes place.

Contribution to existing literature

While official data on international competition cooperation are scarce, legal scholars have been discussing the topic as soon as it emerged. This study aims to further refine existing research on international cooperation in competition cases. It thereby attempts to complete some of the main analyses in this field. This study can be seen as a partial follow-up and reassessment ten years down the road of ZANETTIN's key work 'Cooperation between antitrust agencies at the international level', in which he examined the existing bilateral competition cooperation agreements, with a focus on the 1991 EU-US Agreement.⁶⁹ This study, starting ten years after the conclusion of ZANETTIN's analysis, focuses more closely on one of the 'hard cooperation' paths identified by ZANETTIN, namely the exchange of confidential information, and identifies the evolution that has taken place in the past ten years and that is still desirable in the years to come.

PAPADOPOULOS in 2010, employing a more broad perspective than ZANETTIN, studied international agreements which are devoted to or include competition provisions, in his book 'The international dimension of EU competition law and policy'.⁷⁰ He thereby focused on bilateral enforcement cooperation agreements, bilateral trade agreements including competition provisions, plurilateral regional agreements including competition provisions, and multilateral negotiations on competition.

⁶⁴ F. Jenny, "International Cooperation on Competition: Myth, Reality and Perspective", *The Antitrust Bulletin*, Vol. 48, Winter 2003, 1001.

⁶⁵ M. Chowdhury, "From Paper Promises to Concrete Commitments: Dismantling the Obstacles to Transatlantic Cooperation in Cartel Enforcement", American Antitrust Institute Working Paper No. 11-09, 28 November 2011, 22.

⁶⁶ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 258.

⁶⁷ E. Swaine, "Cooperation, Comity, and Competition Policy: United States" in A. Guzman (ed.), *Cooperation, Comity, and Competition*, New York, Oxford University Press, 2011, 17.

⁶⁸ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 82.

⁶⁹ B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 279.

⁷⁰ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 331p.

While his work is extremely valuable as a comprehensive work on the prevalent situation of international cooperation at the time, it lacks a more practical perspective. Indeed, it does not include an analysis of the functioning of the agreements analysed – the book merely wished to identify the international dimension of EU competition law and policy. PAPADOPOULOS offered a very broad, *albeit* somewhat superficial, analysis of the existing instruments of international cooperation in the field of competition law. This study will engage in a more thorough analysis of a smaller research topic. In particular, it will focus on two research subjects of PAPADOPOULOS' book, namely bilateral enforcement cooperation agreements and to a lesser extent trade agreements including competition provisions. PAPADOPOULOS identified as main weaknesses of the cooperation agreements the fact that they do not facilitate the exchange of confidential information and the fact that they are soft law instruments that do not truly commit the parties. He welcomed the arrival of second generation agreements, but expressed his doubts on whether the EU would conclude more bilateral cooperation agreements in the future. The two main arguments of the book were that the intensity of EU influence depends on the particular type of agreement, and that because of the relatively young age of competition law, a consensus on the optimum operation of competition law and policy is not yet in sight, much less an agreement on a binding multilateral agreement on competition.⁷¹ Therefore, as mentioned before, the central focus of this study will be on enforcement cooperation rather than substantive convergence.

The 2011 book edited by GUZMAN, 'Cooperation, comity, and competition policy', is a very solution-oriented book dealing with the difficulties of international cooperation in competition matters.⁷² The book starts with a series of country reports, providing an overview of the national laws and their extraterritorial reach. While ZANETTIN identified both comity and the exchange of confidential information as forms of hard law, GUZMAN'S book focuses on the former. The book also offers very insightful policy proposals by several experts on the matter, tackling some of the issues international competition cooperation is currently dealing with. The exchange of confidential information, however, is not dealt with as such in the book, but will occupy a particular place in this study. In general, literature on international competition cooperation has mainly focused on the possibilities of a multilateral agreement and its institutional form, the emergence of regional agreements, and the 'network'-idea.⁷³ This study, however, as mentioned, wishes to revive the debate on the different facets of bilateral cooperation.

The future: management plans DG COMP indicate a major rise in FTA's including competition provisions

From the beginning of this study in 2012, until its conclusion in 2017, there has been a status quo in first generation agreements, an increase from zero to (almost) two second generation agreements, a moderate increase in MoUs on competition law, and a significant increase in FTAs containing competition and/or state aid clauses, according to the mid-term prospectuses for bilateral competition cooperation in DG COMP's management plans.⁷⁴ The large increase in FTAs with

⁷¹ Ibid., 90, 260-267.

⁷² A. Guzman (ed.), *Cooperation, Comity, and Competition*, New York, Oxford University Press, 2011, 374p.

⁷³ Also see D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 394p. and C. Noonan, *The Emerging Principles of International Competition Law*, Oxford University Press, New York, 2010, 639p.

⁷⁴ DG Competition Management Plan 2012, available at http://ec.europa.eu/atwork/synthesis/amp/doc/comp_mp.pdf (accessed August 2014), 37; DG Competition Management Plan 2013, available at http://ec.europa.eu/competition/publications/annual_management_plan/amp_2013_en.pdf (accessed June 2017), 38; DG Competition management plan 2014, available at

competition provisions indicates that the most important goal for the EU in this context, apart from the specific situation of agreements with future member states, the ENP, or the Euro-Mediterranean partnership, seems to be the support of trade liberalisation, following the internal philosophy of the EU according to which EU competition policy supports the liberalisation within the Single Market. This raises the question whether this indicates the end of dedicated agreements and what the consequences would be of embedding competition provisions into bilateral FTAs. This study therefore, in its final part, analyses the potential of trade agreements as instruments for international competition cooperation.

The Vitamins Cartel as an example

In his discourse on the *Vitamins* cartel,⁷⁵ FIRST stated that the sentencing recommendation accompanying a case pertaining to this cartel described the cartel as an extremely well organized operation. The recommendation clarified that the co-conspirators held meetings at least on a quarterly basis, during which they exchanged information about pricing, sales volumes, and market share on a country, regional, and worldwide basis. High-level corporate officials also met with each other on a yearly basis to set a ‘budget’, and to make projections of global sales volumes and pricing for the coming year. The co-conspirators agreed on dates for announcing price increases and the firms to announce them.⁷⁶ International competition cooperation should mirror itself to this image. Frequent meetings should be held between both case-handlers as well as higher-level policy makers, deadlines should be coordinated and enforcement actions should be well organised. This study aims to find out how first and second generation agreements (can) contribute to this objective.

Renewed momentum

Finally, this study comes at a time where both the OECD and the ICN have dedicated renewed attention to international cooperation in the field of competition law.⁷⁷ In the OECD/ICN Joint Survey sent out in 2012, international cooperation was identified as a policy priority by 46 agencies, representing 84% of respondents. Increased and enhanced (or widened and deepened) enforcement cooperation is seen as a necessity.⁷⁸ This priority was confirmed by the high number of country submissions for the OECD Policy Roundtable on International Co-operation in Cartel

http://ec.europa.eu/competition/publications/annual_management_plan/amp_2014_en.pdf (accessed June 2017), 45-46; DG Competition management plan 2015, available at https://ec.europa.eu/info/sites/info/files/comp_mp_2015_en.pdf (accessed June 2017), 55; DG Competition management plan 2016, available at https://ec.europa.eu/info/sites/info/files/comp_mp_2016_en.pdf (accessed June 2017), 39. In 2017 no differentiation was made anymore among different types of cooperation agreements and FTAs in the prospectus. DG Competition management plan 2017, available at https://ec.europa.eu/info/sites/info/files/file_import/management-plan-comp-2017_en_0.pdf (accessed June 2017), 41.

⁷⁵ See *F. Hoffmann-La Roche Ltd. v Empagran S.A.*, 124 S.Ct. 2359 (2004). For a quick overview of the European decision, see European Commission, Press Release, “Commission Imposes Fines on Vitamin Cartels”, IP/01/1625, Brussels, 21 November 2001.

⁷⁶ H. First, “The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law”, *Antitrust Law Journal*, Vol. 68, No. 3, 2001, 715.

⁷⁷ See, for instance OECD, The Competition Committee’s two strategic themes for 2012-2014: international co-operation and evaluation of competition interventions – Workplans, DAF/COMP(2012)1, 15 February 2012.

⁷⁸ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 6, 25.

Investigations.⁷⁹ Many agencies indicated that they expected an increase in cooperation, the main reason being the rise in multijurisdictional cases.⁸⁰ While increased cooperation can lead to better cooperation instruments, and requires better cooperation instruments, the opposite can be true as well, and good instruments may lead to increased cooperation. This study looks at how this incentive could be created.

Overview

The main research question is approached in three stages. Part one discusses the background, evolution, and context of international competition cooperation. It is important to understand the history of international competition cooperation to be able to assess and further develop it. More concretely, the first chapter examines the need for international competition cooperation. International cooperation is no longer a ‘luxury’ but has become pivotal for the sake of domestic enforcement as well, due to mainly two factors: globalisation combined with an exponential increase in competition laws and competition agencies. Next, chapter two elaborates on the different shapes cooperation can take. As mentioned, international competition cooperation can take many forms. It can be multilateral or bilateral, formal or informal, and established and maintained via hard or soft legislation. A more fundamental question that can moreover be asked is whether enforcement cooperation should be the end-goal, or rather lead to convergence and harmonisation. Benefits and drawbacks of each option are explored. The origins of international cooperation are analysed in chapter three. The early history of international cooperation is analysed, and certain tendencies or recurrent issues are identified. Specific attention is devoted to the way international cooperation has evolved, in particular whether it advanced with revolutionary leaps, or only gradually, and whether it was able to adapt to a changing reality or rather limped behind. This chapter proceeds chronologically, starting with failed multilateral efforts, over extraterritorial enforcement, to the first landmark OECD documents and the incorporation of the principles put forward in these documents in bilateral agreements.

Part two starts with the development of benchmarks against which the EU’s bilateral competition cooperation agreements can be assessed. Both first and second generation agreements are analysed on four levels: the context of conclusion of the agreements, their content and scope, their legal value, and their use. Particular attention is devoted to the challenges surrounding the exchange of confidential information. Some alternative and complementary cooperation mechanisms from within the competition policy field as well as other policy fields are explored, in order to present a comprehensive picture and to gather inspiration for further improvements in the cooperative process.

Although the focus of this dissertation is on bilateral competition law enforcement agreements, it is important to study the reality in which they appear as well. In part three such agreements are therefore framed among other attempts to address international competition law enforcement issues, in order to determine their relative added value amongst the aforementioned ‘dense web’ of cooperation initiatives, in particular because such other initiatives receive significant attention from

⁷⁹ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 309.

⁸⁰ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 57.

the European Commission.⁸¹ The study of the ‘dedicated’ approach of bilateral cooperation agreements focussing only on competition law will therefore be complemented by an analysis of an ‘integrated’ approach, both on a substantial level, by scrutinising the integration of competition chapters in FTAs, and on a geographical level, by assessing the role of several multilateral initiatives. The emergence of competition chapters in EU FTAs will first be analysed. The evolution and content of such chapters, the rationale behind them, and the role they (can) play is assessed, as well as the potential drawbacks of such an inclusion. In the section on multilateralism, focus will be on the OECD, the WTO, UCNTAD, the ICN, and by exception one regional platform, the ECN. It is analysed what role they fulfil, what challenges they face, and issues of network governance will be discussed. Finally, the main results of this study are assembled in a concluding chapter.

⁸¹ U. Aydin, “Promoting Competition: European Union and the Global Competition Order”, paper prepared for presentation at the European Union Studies Association 11th Biennial International Conference, Los Angeles California, 23-25 April 2009, 2.

PART I: Trial and error in the development of international competition law enforcement cooperation

*“No matter how firmly someone may believe that the antitrust or competition law of a particular place has achieved final wisdom, history offers a strong message that some modesty is called for here.”*⁸²

In order to appreciate the significance of dedicated agreements in the context of international competition law enforcement, it is important to understand how such cooperation has originally evolved, and what necessity it was born from.⁸³ Before analysing the EU’s first and second generation dedicated cooperation agreements, it is therefore necessary to understand the history and development of international cooperation between competition agencies.

1. Need for international competition cooperation

International action in the field of competition law was necessitated by two factors: globalisation, and the exponential increase in the number of jurisdictions that have adopted antitrust laws and have established antitrust agencies. This affected the need for lawmakers and enforcers to consider conduct outside of the nation’s territory. As jurisdiction is limited, cooperation is necessary. State sovereignty has since long been at the centre of the international political order. The concept originated with the Peace of Westphalia in 1648, where the hierarchical organization of international society was replaced with the idea of co-existence between states that are sovereign in their own territory. Sovereign states became the primary subjects of international law as they came to be the sole responsible for the regulation of any matter that arose within their territory.⁸⁴ This sovereignty entails three kinds of jurisdiction. Prescriptive jurisdiction⁸⁵ refers to the power of a state to develop the norm that is applicable to certain conduct. It relates to a state’s right to prescribe norms of conduct, while enforcement jurisdiction deals with the possibility of a state to enforce this law, and thus ensure compliance with it via fines or other punishments.⁸⁶ Judicial jurisdiction, finally, describes the authority of a state’s court or similar institute over people or corporations. Depending on what type of jurisdiction is involved, it can generally be based, according to public international law, on either territory or nationality.⁸⁷

The Permanent Court of International Justice (PCIJ), the predecessor of the International Court of Justice) established the ‘objective territoriality principle’ in its 1927 *Lotus* judgment, confirming that a state may exercise prescriptive jurisdiction over conduct that took place outside of its territory on the ground that it caused harm within that territory.⁸⁸ The Court stated that “*far from laying a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only*

⁸² D. Wood, “Is cooperation possible?”, Luncheon Speech, *New England Law Review*, Vol. 34, No. 1, 111.

⁸³ J. Wayland, “International cooperation at the antitrust division”, remarks as prepared for the International Bar Association’s 16th Annual Competition Conference, Florence, 14 September 2012, 2.

⁸⁴ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 47-48.

⁸⁵ Also known as legislative or subject-matter jurisdiction, A. Jones & B. Sufrin, *EC Competition Law: Text, Cases and Materials*, 3rd ed., New York, Oxford University Press, 2008, 1357.

⁸⁶ B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 7, footnote 1. Also see A. Jones & B. Sufrin, *EC Competition Law: Text, Cases and Materials*, 3rd ed., New York, Oxford University Press, 2008, 1357.

⁸⁷ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 59.

⁸⁸ S.S. *Lotus* (France v Turkey), 7 September 1927, PCIJ, Series A, No. 10, footnote 8.

limited in certain cases by prohibitive rules.”⁸⁹ Such limits have been developed over time in case-law in several jurisdictions. However, relating to enforcement jurisdiction, the PCIJ made it clear that “the first and foremost restriction imposed by international law upon a state is that, failing the existence of permissive rule to the contrary, it may not exercise its power in any form in the territory of another state.”⁹⁰ Contrary to prescriptive jurisdiction, enforcement jurisdiction is thus purely territorial.⁹¹ This was also recognised by Advocate General MAYRAS in the *Dyestuffs* case (see below, Part I, 3.2.1).⁹²

1.1. Globalisation

1.1.1 What is globalisation?

International competition law enforcement is necessitated first of all by globalisation.⁹³ While the term ‘globalisation’ is commonly used, its allocated meaning may differ. STEGER identified four characteristics at the core of the phenomenon, leading him to the following definition: “Globalization refers to a multidimensional set of social processes that create, multiply, stretch, and intensify worldwide social interdependencies and exchanges while at the same time fostering in people a growing awareness of deepening connections between the local and the distant.”⁹⁴ Globalisation is thereby identified as a concept encompassing several dimensions, formed by an economic, political, cultural and ideological component. In the context of this study, focus is put on the economic interdependence of countries.⁹⁵ PAPADOPOULOS defines ‘economic globalisation’ as “improvements in technology and communications, liberalisation of international trade, and the subsequent increase of economic flows through the operation of multilateral firms, that has appeared at least in the last decades, and that has weakened the distinction between the domestic and the international in several fields of economic activity.”⁹⁶ The core characteristic of economic globalisation is therefore the existence of transnational and multinational economic transactions and other economic activities.

The origins of contemporary economic globalisation are traced back to the Bretton Woods Conference of 1944, where the gradual emergence of a new international economic order was assembled. Apart from the creation of a more stable monetary exchange system, the conference resulted in a commitment of the major economic powers to abandon protectionism and expand international trade, as well as to establish binding rules on international economic activities.

⁸⁹ Ibid., paragraph 46.

⁹⁰ Ibid., paragraph 45.

⁹¹ B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 41.

⁹² Joined opinion of Advocate General Mayras in *Imperial Chemical Industries Ltd. v Commission of the European Communities*, *Badische Anilin- & Soda-Fabrik AG v Commission of the European Communities*, *Farbenfabriken Bayer AG v Commission of the European Communities*, *J. R. Geigy AG v Commission of the European Communities*, *Sandoz AG v Commission of the European Communities*, *SA française des matières colorantes (Francolor) v Commission of the European Communities*, *Cassella Farbwerke Mainkur AG v Commission of the European Communities*, *Farbwerke Hoechst AG v Commission of the European Communities*, *Azienda Colori Nazionali - ACNA S.p.A. v Commission of the European Communities*, 57-69, EU:C:1972:32, 695.

⁹³ J. Steenbergen, “Competition and Trade Policy and the Challenge of Globalization” in I. Govaere, R. Quick & M. Bronckers (eds.), *Trade and Competition Law in the EU and Beyond*, Cheltenham, Edward Elgar Publishing, 2011, 3. For a thorough analysis and more broad understanding of the concept of globalisation and its origins, see J. Scholte, *Globalization: a critical introduction*, 2nd ed., New York, Palgrave MacMillan, 2005, 492 p.

⁹⁴ M. Steger, *Globalization, a very short introduction*, New York, Oxford University Press, 2003, 9-12. For a limited overview of other definitions of globalisation, see M. Steger, *Globalization, a very short introduction*, New York, Oxford University Press, 2003, 10.

⁹⁵ A. Klevorick & A. Sykes, “United States Courts and the Optimal Deterrence of International Cartels: a Welfarist Perspective on Empagran”, in E. Fox & D. Crane (eds.), *Antitrust stories*, New York, Foundation Press, 2007, 361.

⁹⁶ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 36-37.

Additionally, the institutional foundations for the establishment of the International Monetary Fund, the International Bank for Reconstruction and Development (later the World Bank) and the General Agreement on Tariffs and Trade (later the World Trade Organisation) were set. The system collapsed in the early 1970s, as President NIXON abandoned the gold-based fixed rate system. Global economic instability followed whereby controlled capitalism (or Keynesianism) was abandoned in favour of a neoliberal approach to economic and social policy in the 1990s, consciously linking the notion of globalisation to the ‘liberation’ of economies globally. This movement was further strengthened by the collapse of the Soviet Union.⁹⁷

In the nineties the international environment for competition policy therefore radically changed due to large-scale liberalisation. The iron curtain disappeared, causing Eastern European states to embrace the free market model. International trade was boosted as well due to the successful conclusion of the Marrakesh agreement.⁹⁸ Developing countries were urged by donors or international institutions to adopt market friendly policies and a better investment climate.⁹⁹ On top of this, the exponential progress in technology, communications, and transport hastened the interdependence of business and commerce. In the last 100 years the world has known five or more big merger waves. In the 1990s in particular the corporate structure of entire industries underwent major change through the wave of megamergers in that period. In 2000 the number of mergers and acquisitions worldwide was already three times higher than in the 1990s while the transaction volume had increased twelvefold.¹⁰⁰

Economic globalisation has been strengthened by three main evolutions. First, trade liberalisation has been accompanied by the liberalisation of financial transactions, resulting in increased mobility within the financial industry and greater investment opportunities, further accelerated via technological advancement. A second evolution is the increasing strength of transnational corporations, resulting in certain power differentials. Finally, international economic institutions like the IMF, the World Bank, and the WTO played an increasingly important role.¹⁰¹

Economic globalisation is most noticeable via foreign direct investment (FDI) movements. Data collected in 2008 by UNCTAD showed that FDI had multiplied by factor seventy during the last thirty-five years, reaching US\$ 1,979 million in 2007, before decreasing again due to the recent financial crisis.¹⁰² Global production and trade have increased roughly threefold since the early 1980s. This demonstrates that FDI is more dynamic than world output and world trade. It can be considered one of the main drivers of globalisation.¹⁰³ However, the recent crisis has reinforced the tendency to rely on protectionism. The DHL Global connectedness index - that represents the extent to which countries are connected via trade, migration, investments and communication - demonstrated that since 2007 the crisis had strongly affected these relations, that are slowly recovering from 2009 onwards.¹⁰⁴

⁹⁷ M. Steger, *Globalization, a very short introduction*, New York, Oxford University Press, 2003, 37-41.

⁹⁸ Agreement establishing the World Trade Organization, Marrakesh, 15 April 1994.

⁹⁹ F. Jenny, “International Cooperation on Competition: Myth, Reality and Perspective”, *The Antitrust Bulletin*, Vol. 48, Winter 2003, 976-977.

¹⁰⁰ H. Klodt, *Towards a Global Competition Order*, Berlin, Liberal Verlag GmbH, 2005, 8, 15, 18-20.

¹⁰¹ M. Steger, *Globalization, a very short introduction*, New York, Oxford University Press, 2003, 40-42, 48.

¹⁰² UNCTAD Database on FDI, as mentioned in A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 38.

¹⁰³ H. Klodt, *Towards a Global Competition Order*, Berlin, Liberal Verlag GmbH, 2005, 9-10.

¹⁰⁴ J.-F. Abbeloos, “Nee, de Wereld is Geen Dorp”, *De Standaard*, 30 november 2012.

1.1.2 How did globalisation affect competition (law)?

This interconnectedness of the global economy has obvious effects for competition and competition law, to such an extent that it is said that “*international competition policy is without doubt one of the most crucial issues of a global political order.*”¹⁰⁵ The *Microsoft* decisions or the *Vitamins* cartel are only some examples of the problems that can be caused by the externalities of one jurisdiction’s regulatory acts on those of another, and of the effect that behaviour occurring in one jurisdiction can have elsewhere.¹⁰⁶ Predicting the size and scope of such effects is, however, a complex issue.

International competition law, or at least international cooperation between competition authorities, is necessitated by what GERBER calls ‘the scissors paradox’, namely the fact that “[p]aradoxically, some of the same forces that increase the need for competition law also constrain its development and undermine its effectiveness.” Facilitated transportation, increased mobility of assets, and faster communication make markets more global, but also facilitate anticompetitive behaviour. This paradox is linked to another contradiction mentioned earlier, namely that between the sovereignty-based legal system, on the one hand, and the political and economic intertwining known as globalisation, on the other. More globalisation, while offering significant (economic) benefits, also increases the losses that can result from anti-competitive conduct.¹⁰⁷ The growing interdependence of the global economy has made the economy blossom, but at the same time it has caused many cartels and anticompetitive mergers to become international in scope as well. Globalisation does not only result in a growth of companies, but also in a growth of markets. When national borders are easily crossed, companies are susceptible to competition from their peers in other jurisdictions. Globalisation, indeed, has a double effect on competition. On the one hand, it intensifies competition as markets that were once protected are now accessible, but on the other hand it jeopardises competition as it fosters anticompetitive behaviour on a much larger scale.¹⁰⁸ Given the rising number of multinational firms, anticompetitive agreements made by these firms have a larger impact as well.¹⁰⁹ Moreover, such firms are often less sensitive to changes in the national regulatory framework. Indeed, VON BISMARCK already cautioned that transnational traffic of goods and capital undermine domestic regulations. Later, ‘anti-globalisation’ protestors objected against ‘plutocracy’ and the political power of larger corporations.¹¹⁰ International corporations can significantly influence processes of regulatory competition among states.¹¹¹

As rising economic liberalisation led to the removal of trade barriers, it created fresh incentives for anti-competitive behaviour by firms becoming more vulnerable to foreign competition. Competition

¹⁰⁵ H. Klodt, *Towards a Global Competition Order*, Berlin, Liberal Verlag GmbH, 2005, 8.

¹⁰⁶ M. Gal “International Antitrust Solutions: Discrete Steps or Causally Linked?” in J. Drexler, W. Grimes, C. Jones, R. Peritz, & E. Swaine (eds), *More Common Ground for International Competition Law?*, Cheltenham, Edward Elgar Publishing, 2011, 240.

¹⁰⁷ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 6, 89.

¹⁰⁸ H. Klodt, *Towards a Global Competition Order*, Berlin, Liberal Verlag GmbH, 2005, 8-9, 28.

¹⁰⁹ The two main forms of anticompetitive behaviour are international cartels and anticompetitive global mergers. Other types of anticompetitive practices can have cross-border effects as well. N. Ormonov, “Exchange of Information in the Enforcement of Antitrust Laws”, *Asper Review of International Business & Trade Law*, Vol. 6, 2006, 343.

¹¹⁰ D. Murphy, *The structure of regulatory competition – Corporations and public policies in a global economy*, Oxford, Oxford University Press, 2004, 3.

¹¹¹ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 2.

laws therefore needed to supplement this liberalisation in order to protect its effects.¹¹² Whereas in 1999 it was still said that international cooperation was only relevant in less than a third or even a quarter of the cases handled by a national competition authority,¹¹³ this has changed immensely today, even if globalisation is not a new phenomenon.¹¹⁴ From 1991 until 2011, the number of cross-border merger filings (involving companies inside and outside the EU) has increased five-fold. Already in 1999, cross-border mergers amounted to 80% of all FDI-flows.¹¹⁵ Mergers involving at least one company based outside the EU, with effects in the EU, now overtake the number of mergers that are intra-EU. While concrete percentages vary, all law firms responding to the survey sent in the framework of this study indicated that international merger cases constituted at least 40% of the cases dealt with by the firm. The percentage thereof that dealt with third countries, varied from 20 to 100%.¹¹⁶ With regard to cartels, data show that between 2011 and 2013, 70% of cartel cases decided by DG COMP (Directorate-General for Competition) involved a non-EU company. In absolute numbers, the amount of ‘international’ cartel cases between 1990 and 1995 amounted to less than fifteen cases, while this number rose to ninety-two between 2008 and 2012.¹¹⁷ With regard to international cartel cases the numbers varied. Some firms indicated that 20 to 40% of their cartel cases were international, of which 80 to 100% involved third countries, while at the other extreme some firms indicated that 80 to 100% of cases were international, of which 60-80% was including third countries. It was moreover said that “*all cartel cases at EU level usually have an impact on non-EU countries since mother companies of subsidiaries involved in the infringement are often located in the US, Asia, Russia or BRICS countries.*”¹¹⁸ The average number of jurisdictions involved reported by respondents ranged from four to seven.¹¹⁹ Former competition Commissioner ALMUNIA stated in a speech in 2011 that his services were investigating over twenty-five cartel cases, only about half of which were limited to Europe.¹²⁰

Along with this increase in international cases, DG Competition witnessed a significant increase in international cooperation in competition law investigations, both in the number of multijurisdictional cases as well as in the number of jurisdictions involved in each case.¹²¹ It is estimated that between 30 and 50% of DG Comp’s major cases of recent years involved international cooperation, more specifically 40% in cartel decisions, 50% in antitrust decisions, 30% in mergers phase II, and 33% in

¹¹² J. Basedow, “Competition Policy in a Globalized Economy: from Extraterritorial Application to Harmonization” in M. Neumann & J. Weigand (eds), *The International Handbook of Competition*, Cheltenham, Edward Elgar Publishing, 2004, 321.

¹¹³ D. Wood, “Is cooperation possible?”, Luncheon Speech, *New England Law Review*, Vol. 34, No. 1, 108.

¹¹⁴ A. Klevorick & A. Sykes, “United States Courts and the Optimal Deterrence of International Cartels: a Welfarist Perspective on Empagran” in E. Fox & D. Crane (eds), *Antitrust stories*, New York, Foundation Press, 2007, 361.

¹¹⁵ U. Aydin, “Promoting Competition: European Union and the Global Competition Order”, paper prepared for presentation at the Biennial Conference of the EUSA, Los Angeles, CA, 23-25 April 2009, 16.

¹¹⁶ Result of author’s law firm survey (see Annex I).

¹¹⁷ OECD, *Challenges of International Co-operation in Competition Law Enforcement*, 2014, available at <http://www.oecd.org/competition/challenges-international-coop-competition-2014.htm> (accessed March 2015), 31-33.

¹¹⁸ Result of author’s law firm survey (see Annex I).

¹¹⁹ Ibid.

¹²⁰ J. Almunia, “Cartels: the Priority in Competition Enforcement”, Speech at the 15th International Conference on Competition: a Spotlight on Cartel Prosecution, Berlin, 2011, at http://ec.europa.eu/competition/speeches/index_theme_1.html (accessed December 2011); also see A. Italianer, “Zero Tolerance for International Cartels”, Speech at the ICN Cartel Workshop, Bruges, 2011, at http://ec.europa.eu/competition/speeches/index_theme_1.html (accessed December 2011). Further references can be found in the Commission’s annual Management Plans, available at http://ec.europa.eu/dgs/competition/index_en.htm.

¹²¹ OECD, *Discussion on Limitations and Constraints to International Co-operation*, Contribution of the European Union, DAF/COMP/WP3/WD(2012)41, 23 October 2012, 2.

mergers phase I – commitments.¹²² Globally, the ICN-OECD Joint Survey on international enforcement cooperation identified a clear trend of increased international cooperation in the period 2007-2011, with an estimated increase of 15% in cartel cases, 35% in merger review cases and 30% in unilateral conduct cases. When comparing the number of cross-border cartel investigations in the periods 1990-1994 and 2007-2011, data suggest an increase of 527%.¹²³

The importance the Commission places on fighting international cartels is clear from many of its formal and informal communications. The section ‘International’ of the website of DG COMP opens with the heading ‘Facing the challenges of globalisation’. The Commission therefore explains its international engagements through the need for effective enforcement in a globalised economy, where a majority of companies operates across borders, affecting several distinct national markets.¹²⁴ The need for a global reach of competition law enforcement was not only put forward by competition authorities, it is also supported by legal doctrine, confirming that assistance between states, for instance during investigations, proceedings or enforcement action, is essential for the effective enforcement of national competition laws.¹²⁵ It is recognised that companies and business transactions alike have taken on global dimensions that call for transnational cooperation, and that the effects of such global transactions cannot be confined to one jurisdiction or be isolated.¹²⁶ One can therefore conclude that “[i]nternational problems need international solutions.”¹²⁷ If anticompetitive behaviour operates across borders, competition law enforcement should also have an international reach.¹²⁸

1.2 Proliferation of competition laws and increase in enforcement activity

Another factor explaining the need for (increased) international cooperation on competition matters is the proliferation of competition laws. The 2012 OECD Policy Roundtable on Improving International Co-operation in Cartel Investigations recognized from the outset that the central problems facing international competition law enforcement stem from the diversity in legal systems underpinning enforcement and the sheer number of competition agencies seeking to work together.¹²⁹ The 2014 OECD document on Challenges of International Co-operation in Competition Law Enforcement even identified the immense global proliferation of both competition laws and

¹²² M. Van der Wee, “Competition Policy in a Globalised Economy: Challenges and Responses”, presentation for International Relations Unit DG Competition, 27 September 2012, on file with author.

¹²³ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 47.

¹²⁴ European Commission webpage, “Facing the challenges of globalisation”, http://ec.europa.eu/competition/international/overview/index_en.html (accessed April 2012).

¹²⁵ J. Basedow, “Competition Policy in a Globalized Economy: from Extraterritorial Application to Harmonization” in M. Neumann & J. Weigand (eds), *The International Handbook of Competition*, Cheltenham, Edward Elgar Publishing, 2004, 325.

¹²⁶ H. Dieckmann, “The Benefits of Cooperation between Competition Authorities”, Inaugural Symposium of the Competition Policy Research Center, Tokyo, 2003, 1, at <http://www.jftc.go.jp/cprc/DP/CPDP-9-E.pdf> (accessed December 2011), 1; A. Jones & B. Sufrin, *EC Competition Law: Text, Cases and Materials*, 3rd ed., New York, Oxford University Press, 2008, 1357.

¹²⁷ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 259.

¹²⁸ J. Wayland, “International cooperation at the antitrust division”, remarks as prepared for the International Bar Association’s 16th Annual Competition Conference, Florence, 14 September 2012, 5.

¹²⁹ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 13.

enforcers as “the single most important development in the competition area over the last 20 years.”¹³⁰ Even though competition law is a relatively young branch of law,¹³¹ the first laws enacted in 1889 in Canada (the US Sherman Act following swiftly in 1890)¹³² and in 1923 in Europe (Germany), today nearly 130 countries have enacted competition laws and 120 have established the agencies to enforce them.¹³³ It is interesting to note that such early competition laws were mostly inspired by trade policy.¹³⁴ Younger competition agencies are also becoming more active.¹³⁵ These phenomena increase the occurrence of several authorities simultaneously investigating the same case, applying different national substantive and procedural laws, based on diverse legal and economic standards, and with different interests in mind.¹³⁶ This causes difficulties at several stages, be it the substantive, remedial or procedural level.

The existence of substantive conflicts is mainly caused by different traditions of competition policy and divergent industrial (or other) policy goals.¹³⁷ The simultaneous investigation of a case by several competition authorities without cooperation implies a duplication of efforts and expenses for both the agencies and companies involved. International mergers can be subjected to reviews by five, ten,

¹³⁰ OECD, Challenges of International Co-operation in Competition Law Enforcement, 2014, available at <http://www.oecd.org/competition/challenges-international-coop-competition-2014.htm> (accessed March 2015), 28.

¹³¹ At the end of the 1970s only 9 jurisdictions had a competition law. This number slowly grew to 23 by 1990. In 2004, over 80 countries had a form of competition legislation, of which more than two-thirds had taken effect only since 1992. M. Albers, “National Competition Laws, International Cooperation and Procedural Rights” paper for Cauffman, Caroline, Hao, Qian (eds), *Procedural Rights in Competition Law in the EU and China*, China-EU Law Series, Vol 3., Berlin, Heidelberg, Springer, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567001 (accessed July 2017), 1; J. Basedow, “Competition Policy in a Globalized Economy: from Extraterritorial Application to Harmonization” in M. Neumann & J. Weigand (eds), *The International Handbook of Competition*, Cheltenham, Edward Elgar Publishing, 2004, 321.

¹³² Although it should be mentioned that federal antitrust legislation was preceded by state-level antitrust statutes in over twenty states in the US. Since at least the 1700s English common law provided safeguards against anticompetitive behaviour, but its competition law elements continuously weakened from the 1840s onwards, prompting the adoption of statutory competition law in Canada and the US. T. Büthe, “The politics of market competition: trade and antitrust in a global economy”, paper for Martin, Lisa L. (ed.), *The Oxford Handbook of the Political Economy of International Trade*, Oxford, Oxford University Press, 2015, available at http://leitner.yale.edu/sites/default/files/files/resources/papers/Buthe_chapter_all_2014-03-20.pdf (accessed July 2017), 2, footnote 2.

¹³³ The OECD attributes this expansion to the spreading of the belief that “a strong competition policy contributes substantially to successful economic development, to the promotion of consumer welfare, and to a vibrant, market economy [sic]”. OECD, Challenges of International Co-operation in Competition Law Enforcement, 2014, available at <http://www.oecd.org/competition/challenges-international-coop-competition-2014.htm> (accessed March 2015), 26.

¹³⁴ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 9-12. BÜTHE claimed that archival research and the legislative record suggested that in Canada the parliamentary majority’s enthusiasm for the law was mostly because of trade policy concerns. T. Büthe, “The politics of market competition: trade and antitrust in a global economy”, paper for Martin, Lisa L. (ed.), *The Oxford Handbook of the Political Economy of International Trade*, Oxford, Oxford University Press, 2015, available at http://leitner.yale.edu/sites/default/files/files/resources/papers/Buthe_chapter_all_2014-03-20.pdf (accessed July 2017), 3.

¹³⁵ OECD, Challenges of International Co-operation in Competition Law Enforcement, 2014, available at <http://www.oecd.org/competition/challenges-international-coop-competition-2014.htm> (accessed March 2015), 26-27. Also see Asian Development Bank, Competition Law Toolkit, “Countries that have Adopted Systems of Competition Law”, available at <http://www.adb.org/Documents/Others/OGC-Toolkits/Competition-Law/complaw030000.asp> (accessed January 2012).

¹³⁶ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 44.

¹³⁷ M. Blauburger, “The Governance of Overlapping Jurisdictions. How International Cooperation Enhances the Autonomy of Competition Authorities”, Transtate Working Papers, No. 102, Bremen, 2009, 1.

or twenty other agencies around the world.¹³⁸ Different deadlines and requirements may have to be fulfilled, burdening the undertakings involved with additional costs and legal unpredictability.¹³⁹ Remedial problems are best illustrated by the infamous GE/Honeywell and Boeing/McDonnell cases, which are discussed below (see below, Part I, 2.2.5).

The abovementioned problems can be described as consequences of ‘over-regulation’, in the sense that they are caused by the applicability of more than one set of national competition rules. System friction between different antitrust regimes, or the fact that one country's competition laws may facilitate conduct that another country's laws prohibit, is not mitigated in the field of antitrust by supranational choice of law rules.¹⁴⁰ If certain anticompetitive behaviour is governed by multiple competition laws, the company will end up complying with the most restrictive rule. While this does not always result in truly conflicting obligations for the firm, it is a disincentive for innovation and pro-competitive behaviour.¹⁴¹ It results in a veto power in the hands of the most restrictive jurisdiction.¹⁴² Moreover, if any given competition authority has a 5% probability of a false positive for instance, conduct scrutinized by 20 enforcers is faced with a 64% chance of at least one enforcer erroneously prohibiting the conduct.¹⁴³ However, ‘under-regulation’ can occur as well in the form of laws that are too lenient or exemptions and exclusions from the application of competition rules, restrictions in the scope of application, procedural or enforcement difficulties, lack of enforcement or strategic law enforcement. The behaviour of competition agencies hoping to free ride on the enforcement actions of others may result in collective action problems and gaps in the protection of competition.¹⁴⁴ Companies can benefit from these gaps to engage in anti-competitive behaviour. This can be linked to the so-called ‘regulatory competition’ among states. It was already mentioned that it becomes increasingly difficult for a single state to govern the behaviour of large corporations. Open economies provide opportunities “for firms to seek the most favourable regulatory climate, either by relocating production elsewhere or by voicing their interests to regulators.”¹⁴⁵ Powerful firms may exert influence on lawmakers and this may result in their preferences shaping state regulations.¹⁴⁶ This can take the form of either explicit statutory exceptions or weak enforcement, allowing states to compete with each

¹³⁸ C. James, “International Antitrust in the 21st Century: Cooperation and Convergence”, address before the OECD Global Forum on Competition, Paris, 17 October 2001, 6. Whereas in 1990 fewer than a dozen jurisdictions engaged in merger review, and approximately 60 jurisdictions in 2000, in 2010 nearly 100 jurisdictions did so. M. Coppola, “ICN Best Practice: Soft Law, Concrete Results”, *CPI Antitrust Chronicle*, July 2011, 2.

¹³⁹ In 1989 the Gillette/Wilkinson merger was notified in fourteen jurisdictions. In 1999 the Exxon/Mobil merger was notified in twenty jurisdictions. It must be noted, however, that these transactions took place before the EU Merger Regulation, which noticeably simplified the process. A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 43, 91.

¹⁴⁰ A. Piilola, “Assessing theories of global governance: a case study of international antitrust regulation”, *Stanford Journal of International Law*, Vol. 39, 2003, 224.

¹⁴¹ E. Elhauge & D. Geradin, *Global Competition Law and Economics*, 2nd ed., Oxford and Portland Oregon, Hart Publishing, 2011, 1137-1138.

¹⁴² M. Gal, “International Antitrust Solutions: Discrete Steps or Causally Linked?” in J. Drexler, W. Grimes, C. Jones, R. Peritz, & E. Swaine (eds), *More Common Ground for International Competition Law?*, Cheltenham, Edward Elgar Publishing, 2011, 242.

¹⁴³ F. Wagner-von Papp, “Should Google’s Secret Sauce be Organic?”, *Melbourne Journal of International Law*, Vol. 16, 2015, 622.

¹⁴⁴ J. Basedow, “Competition Policy in a Globalized Economy: from Extraterritorial Application to Harmonization” in M. Neumann & J. Weigand (eds), *The International Handbook of Competition*, Cheltenham, Edward Elgar Publishing, 2004, 322; A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 46.

¹⁴⁵ D. Murphy, *The structure of regulatory competition – Corporations and public policies in a global economy*, Oxford, Oxford University Press, 2004, 4.

¹⁴⁶ *Ibid.*, 9.

other to provide competitive advantages to local firms.¹⁴⁷ As a consequence of globalisation, the range and domain of cases on which governments act, sometimes to influence the activities of firms in other jurisdictions, has continuously expanded.¹⁴⁸ Regulatory competition can then result in sub-optimal protection of competition on the market with the rules being dictated by firm-interests rather than the public interest.¹⁴⁹

In sum, the de facto regime consisting of an overlap of an increasing number of domestic regulatory environments causes legal uncertainty for firms engaging in international business as well as problems of both over- and under regulation.¹⁵⁰ STEPHAN compared the superimposing of differing laws of multiple jurisdictions on a single firm to a perverse and harmful tax on firms that operate internationally.¹⁵¹ These issues cannot be tackled by individual states alone, and require international cooperation.

2. Four axes of international competition cooperation

There is general agreement about the need for international action in the field of competition law. The debate concerning the best way forward, however, is not any less diverse today than it was in the past. Indeed, international cooperation is possible in more than one way. The main variables can be placed along four axes, identified in this section.

¹⁴⁷ J. Trachtman, "International regulatory competition, Externalization, and Jurisdiction", *Harvard International Law Journal*, Vol. 34, No. 1, 1993, 54.

¹⁴⁸ D. Murphy, *The structure of regulatory competition – Corporations and public policies in a global economy*, Oxford, Oxford University Press, 2004, 228.

¹⁴⁹ When firms are faced with a – to them – unfavourable change in regulation, they can act in different ways. They can accept the regulation and do nothing, but they could also 'vote with their feet' and relocate, or they could lobby, educate, and litigate regulations that reflect their interests. Changes in regulations can therefore be explained at times by the incentives and strategies of private sector firms as governments will often respond to this type of firm behaviour. Governments will compete with each other over economic power. (D. Murphy, *The structure of regulatory competition – Corporations and public policies in a global economy*, Oxford, Oxford University Press, 2004, 5. Also see J. Trachtman, "International regulatory competition, externalization, and jurisdiction", *Harvard International Law Journal*, Vol. 34, No. 47, 1993, 51-52.) As claimed by MURPHY "[b]usiness power is central to our understanding of a country's power in the international arena." (D. Murphy, *The structure of regulatory competition – Corporations and public policies in a global economy*, Oxford, Oxford University Press, 2004, 233). Governments can react to the abovementioned firm behaviour in three ways: by relaxing regulations, by exerting pressure on foreign countries to change their regulations, or by erecting regulations that protect domestic firms against foreign rivals. This behaviour, in turn, can in the long run result in either a movement toward a lower common denominator or a race to the bottom, a movement toward a higher common denominator or race to the top, or in the persistence of diverse regulations. (D. Murphy, *The structure of regulatory competition – Corporations and public policies in a global economy*, Oxford, Oxford University Press, 2004, 5, 10.) Economic regulation is often mentioned in a context referring to war or conflict. LUTTWAK, for instance, stated that "[e]conomic regulation is as much a tool of statecraft as military defenses ever were. Hence, insofar as external repercussions are considered, the logic of state regulation is in part the logic of conflict" (E. Luttwak, "From geopolitics to geo-economics: logic of conflict, grammar of commerce", *National Interest*, No. 20, 1990, as cited in D. Murphy, *The structure of regulatory competition – Corporations and public policies in a global economy*, Oxford, Oxford University Press, 2004, 211) and TRACHTMAN claimed that "regulatory competition [in this context meaning: competitive deregulation, competitive failure to regulate, and regulatory subsidies] may be a more easily available tool than more overt subsidies and may be the decisive weapon in the international economic warfare of the coming years." (J. Trachtman, "International regulatory competition, externalization, and jurisdiction", *Harvard International Law Journal*, Vol. 34, No. 47, 1993, 53.)

¹⁵⁰ A. Guzman, "The Case for International Antitrust", *Berkeley Journal of International Law*, Vol. 22, 2004, 355.

¹⁵¹ P. Stephan, "Global Governance, Antitrust, and the Limits of Cooperation", *Cornell International Law Journal*, Vol. 38, 2005, 194. Also see A. Guzman, "International competition law" in A. Guzman and A. Sykes (eds), *Research handbook in international economic law*, Cheltenham, Edward Elgar Publishing, 2007, 428-432, on the costs of non-cooperation.

2.1 Multilateralism v bilateralism

A first choice that should be made is deciding on how many partners to engage with. The discussion on multilateral versus bilateral cooperation, however, concerns more than the number of parties involved.

2.1.1 Level of trust and intensity of cooperation

The fact that multilateral cooperation involves more, and often more diverse, partners has several implications. In a multilateral framework, developed and less developed countries, both in general and with regard to their experience with competition law, need to agree on a common approach. It is logical to assume that cooperation and interaction will generally be more superficial in multilateral frameworks than in a bilateral setting, as the latter creates a more favourable environment to generate trust between the parties and to promote an intense level of continuous cooperation and interaction.¹⁵²

Considering the sensitive nature of competition policy to nation-states – being closely linked to other policy areas such as industrial policy and trade – and the different experiences states have with it, it is foreseeable that reaching an agreement will be very challenging in a diverse multilateral context. Agreement is often lacking even on the basic goal(s) of competition law and its substantial functions, which is the common basis needed to work out more detailed issues.¹⁵³ The existence of such fundamental differences can be illustrated by the Japanese competition system. The regulatory culture in Japan is centred towards economic welfare, rather than consumer welfare, and operated through guidance whereby decisions do not always require a justification. Opposition from other economic ministries to strict enforcement is moreover more common and more fierce than elsewhere.¹⁵⁴ This is in stark contrast with the ideologies underpinning competition law in the EU and the US.

It is often feared that the result of hard multilateral negotiations would reflect only a lowest common denominator and could therefore have a perverse effect on the development of a sound competition policy. The relatively recent emergence of competition laws on a global scale, the great diversity among the existing regimes, and the national sensitivities linked to competition policy, render this fear not entirely ungrounded. Bilateral cooperation agreements appear to be a preferable way to move forward at the moment, complemented by networks such as the ICN (see below, Part III, 2.1.4).

2.1.2 Power dynamics

¹⁵² For an overview of technical assistance clauses in bilateral enforcement cooperation agreements from 1976 to 2009, see A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 56-57. 8 Out of 27 agreements contained such clauses.

¹⁵³ R. Trittel, “Is a multilateral Framework Necessary?”, WTO Regional Workshop on Competition Policy, Cape Town, 22-24 February 2001, at <http://www.ftc.gov/bc/international/docs/wtocapetown.pdf> (accessed December 2011).

¹⁵⁴ G. Trujillo, “Mutual Assistance under the International Antitrust Enforcement Assistance Act: Obstacles to a United States-Japanese Agreement”, *Texas International Law Journal*, Vol. 33, Summer 1998, 621.

TIMBERG rightly underlined the essentially political nature of drafting a multilateral legal convention, in particular when it involves vital national interests or controversial economic policies.¹⁵⁵ Apart from the differing experiences of countries with competition law and their different cultural, political, and economical background, international power dynamics may make the negotiation of a multilateral agreement more difficult than bilateral negotiations.¹⁵⁶ GERBER pointed to significant disparities between the capacities of states to influence conduct on global markets, due to different levels of political and economic influence, and therefore also differing influence of a state's conduct norms on global competition.¹⁵⁷ This influence is also reflected in the negotiation of international arrangements. MURPHY underlined the impact of market size as an aspect of national power on the determination of the set of regulations that are adopted internationally and pointed to the domination of the US, the EU and Japan on the international economic system, its institutions, and global trading rules.¹⁵⁸ Changing power dynamics might, however, promote the search for multilateral solutions. For instance, the growing importance of the Chinese and Indian competition systems influences the dynamics between the EU and the US, traditionally the two most dominant antitrust players. It becomes increasingly difficult to resolve issues transatlantically without taking the competition authorities of these rising economies into account.¹⁵⁹ Globalisation and the ensuing rise in the number of competition laws and authorities, have indeed created a multi-polar world in which a transatlantic agreement no longer solves all problems. Power dynamics are not absent in bilateral negotiations, however. According to PAPADOPOULOS bilateral competition cooperation agreements facilitate the economically and politically stronger party in steering the agreement towards its own preferences, thereby increasing its national power, which may explain the rather intense pursuit by the US and EU of such agreements.¹⁶⁰

2.1.3 Inclusiveness

As mentioned before, more diverse partners will be involved in multilateral discussions. While this renders negotiations more complex, it also enriches them. Not only does it allow the parties to draw from a broader range of experiences, it also offers less developed countries a chance to be involved, coordinate their actions, and have the opportunity to benefit from the experience and expertise of others. Developing countries are often not selected as a partner for bilateral cooperation, or do not have sufficient negotiation powers or the human capital to engage in the negotiation of this type of agreements.¹⁶¹ Some cooperation instruments are not readily available to every agency.¹⁶²

2.1.4 Reach/Impact

¹⁵⁵ S. Timberg, "Restrictive Business Practices as an Appropriate Subject for United Nations Action", *Antitrust Bulletin*, Vol. 1, 1955-1956, 418-419.

¹⁵⁶ Although this will also impact bilateral negotiations, be it to a lesser extent.

¹⁵⁷ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 3-4.

¹⁵⁸ D. Murphy, *The structure of regulatory competition – Corporations and public policies in a global economy*, Oxford, Oxford University Press, 2004, 233.

¹⁵⁹ M. Gal, "Review Essay: New Perspectives on International Antitrust", *The American Journal of International Law*, Vol. 106, 2012, 407.

¹⁶⁰ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 261.

¹⁶¹ *Ibid.*, 232.

¹⁶² ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 23.

A truly global competition culture can only be attained when many countries are involved. As market sizes increase, bilateral agreements encounter their limitations. A proliferation of bilateral agreements in the long term might prove to be counter-effective and confusing, although such effects may be somewhat mitigated by engaging such authorities in networks (see below, Part III, 2.3).¹⁶³ Bilateral agreements therefore contribute to a paradox: while they are the easiest form of cooperation because trust is more easily created and monitoring is relatively straightforward, in the end they contribute to an overall more complex environment as the proliferation of bilateral cooperation agreements would result in a different kind of patchwork of rules and norms, entailing transaction costs each time an agreement is negotiated.¹⁶⁴ TAYLOR pointed to the potential transaction costs that would be involved in negotiating bilateral agreements between each nation, and the scope for widely different results in each case. He calculated that if 120 of the world's nations possessed competition laws, a network of over 7000 bilateral agreements would be required.¹⁶⁵ Dealing with conduct that extends beyond a certain bilateral relationship remains cumbersome. Indeed, the rules may still differ significantly from one bilateral regime to another.¹⁶⁶

Nevertheless, multilateral forums often have a restricted reach as well. Some groupings have limited membership, while others have a small geographical scope. Others have a substantive limitation. Discussions within the ICN for instance are strictly limited to competition law and policy, whereas debate in the WTO will involve competition issues with a trade-dimension. For instance, problems relating to competition agency-effectiveness are an appropriate topic for an ICN meeting, but not for the WTO, whereas UNCTAD would be the suitable forum to discuss the training of younger agencies, as this can be seen as a competition issue with a development-aspect.

2.2 Enforcement cooperation v convergence/harmonisation

The second axe of discussion revolves around whether the goal should be to reach similar or uniform competition laws via convergence or harmonisation, or rather to focus on enforcement cooperation. Evidently both options are not mutually exclusive. According to TERHECHTE, international competition enforcement law does not revolve around the postulate of unity, but rather focuses on minimising or overcoming the disadvantages of its fragmentary character, mainly via processes of 'cooperation' and 'convergence'.¹⁶⁷ This is in line with the findings of THOMPSON, who stated that international law enforcement contains three options that are not necessarily strictly separated: conflict, cooperation, and convergence.¹⁶⁸ In this section an extra distinction will be made

¹⁶³ See for instance A.-M. Slaughter, *A New World Order*, Princeton, Princeton University Press, 2004 and M. de Visser, *Network-Based Governance in EC law, the Example of EC Competition Law and EC Communications Law*, Oxford and Portland, Oregon, Hart Publishing, 2009.

¹⁶⁴ U. Aydin, "Promoting Competition: European Union and the Global Competition Order", paper prepared for presentation at the Biennial Conference of the EUSA, Los Angeles, CA, 23-25 April 2009, 8. Also see M. Taylor, *International Competition Law: a New Dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 120-121. TAYLOR stated that (based on the mathematical formula $N = (n \times (n-1))/2$, where N is the number of bilateral agreements required and n is the number of countries with competition laws existing at a given time) if 120 nations were to possess competition laws, a network of over 7,000 bilateral agreements would be required.

¹⁶⁵ M. Taylor, *International competition law – A new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 120-121.

¹⁶⁶ P. Nihoul & T. Lübbig, "Competition Policy: Going International?", *Journal of European Competition Law & Practice*, Vol. 1, No. 4, 2010, 265.

¹⁶⁷ J. Terhechte, *International Competition Enforcement Law Between Cooperation and Convergence*, Heidelberg, Springer-Verlag, 2011, 75.

¹⁶⁸ W. Connolly, "Lessons to be Learned: the Conflict in International Antitrust Law Contrasted with Progress in International Financial Law", *Fordham Journal of Corporate and Financial Law*, Vol. 6, No.1, 2001, 226.

between convergence and harmonisation. Unification, in the sense of one global, uniform set of competition rules, is left out of this analysis due to its entirely hypothetical nature.

2.2.1 Definitions

Convergence in the context of this study indicates “*the tendency [of competition law systems] to grow more alike, to develop similarities in structures, processes and performances.*”¹⁶⁹ Put differently, convergence “*expects national competition law systems to align with each other in ways that improve it.*”¹⁷⁰ The last part of this definition is debateable, as convergence towards an inferior standard is possible as well. The point of departure is that competition laws across the globe have not been modelled after a single standard. Varying (economic) concerns, idiosyncratic use of language and other factors have created unique pieces of legislation. Sharing experiences and developing best practices may, however, lead to the appearance of certain commonly held principles.¹⁷¹ It is a rather passive process, in contrast with harmonisation, which can be described as active convergence. It is conscious, intentional and works towards a predefined standard.¹⁷²

The term cooperation refers to “*consensual joint efforts to accomplish a single job.*”¹⁷³ In this study, ‘the job’ is understood as international antitrust enforcement. More concretely, enforcement cooperation can include notification, joint discussions on a particular case (e.g. market definition or case theories) or on more general policy issues, discussing and aligning remedies, coordinating investigations (e.g. timing), and the exchange of non-confidential and confidential information.¹⁷⁴

2.2.2 Benefits of convergence/harmonisation: simplification and legal certainty

Having to operate in a fragmented global legal environment with a great diversity of national (competition) laws, entails some risks, costs, and inconveniences for companies as well as competition agencies. Resources are not optimally spent, and innovation can be stifled. Convergence or harmonisation would certainly simplify the international business environment and make it more transparent and predictable.¹⁷⁵ Convergence or harmonisation can take place on both a procedural and substantive level. Procedural convergence or harmonisation can remove unnecessary costs caused by multiple procedures with differing deadlines or information requests, for instance in the field of merger notifications or leniency applications. Substantive convergence or harmonisation could tackle differences in the legal and economic analysis of alleged anticompetitive conduct, thereby reducing the risk of reaching inconsistent or conflicting remedies.¹⁷⁶

¹⁶⁹ C. Kerr, *The Future of Industrial Societies: Convergence or Continuing Diversity?*, Cambridge Massachusetts, Harvard University Press, 1983, 3.

¹⁷⁰ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 9.

¹⁷¹ M. Joelson, *An International Antitrust Primer: A Guide to the Operation of United States, European Union and Other Key Competition Laws in the Global Economy*, 3rd ed., Alphen aan den Rijn, Kluwer Law International, 2006, 6.

¹⁷² E. Lohse, “The Meaning of Harmonisation in the Context of European Union Law – a Process in Need of Definition” in M. Andenaes & C. Andersen (eds), *Theory and Practice of Harmonisation*, Cheltenham, Edward Elgar Publishing, 2011, 291.

¹⁷³ D. Wood, “Is cooperation possible?”, Luncheon Speech, *New England Law Review*, Vol. 34, No. 1, 105.

¹⁷⁴ On account of completeness, it must be mentioned here that coordination is seen as one aspect of enforcement cooperation, and can refer to policy coordination, coordination of dawn raids, coordination of deadlines, etcetera.

¹⁷⁵ Notable proponents of an international competition law are GUZMAN and FOX.

¹⁷⁶ D. Sokol, “International Antitrust Institutions” in A. Guzman (ed.), *Cooperation, Comity, and Competition*, New York, Oxford University Press, 2011, 189.

In general, the benefits of harmonised international antitrust rules, according to its proponents, are that inconsistent decisions and judgments, biased enforcement, and under-enforcement would be avoided, and that transaction costs would decrease.¹⁷⁷ The main argument put forward in this context revolves around the concept of consistency, that is believed to be crucial to gain investor- and company trust in the market.¹⁷⁸ It is believed that global welfare is not maximized by the coexistence of competition laws of individual states that are engaged in significant international trade.¹⁷⁹ However, as demonstrated below, such benefits are not as straightforward as they seem. It is also said that the harmonisation of rules is a necessity in light of fast technological innovation and the resulting opportunities for abuse.¹⁸⁰ Paradoxically, harmonisation might be least suited in an environment of fast-paced innovation and evolution, as it is characterized by often stringent procedures for review causing rigidity.

Some practitioners mention “a responsibility to harmonize differences as much as possible.”¹⁸¹ The European section of the business community within the International Chamber of Commerce even claimed that procedural and substantive convergence or harmonisation is a ‘preliminary requirement’ for further cooperation, for example in the field of information exchange, to limit the risk of misuse or information.¹⁸² PAPADOPOULOS put forward that international harmonisation can be regarded as an instrument to provide context to cooperation.¹⁸³

2.2.3 Drawbacks of convergence/harmonisation: achievable nor desirable

Among those opposing convergence or harmonisation in the form of an international antitrust law, arguments vary from it not being achievable, to it not being desirable.

2.2.3.1 Not achievable

A) Insufficient agreement

One of the main arguments against some form of international competition law is that at present, as well as in the foreseeable future, it is simply not possible. Currently, insufficient agreement exists globally on what competition law should try to accomplish (its goal(s)) and how it should do so. While BASEDOW stated in 2004 that a minimum harmonisation was the only realistic option at that time,¹⁸⁴ more than ten years later the international climate is still not ready to pursue this. Even

¹⁷⁷ E. Elhauge & D. Geradin, *Global Competition Law and Economics*, 2nd ed., Oxford and Portland Oregon, Hart Publishing, 2011, 1240.

¹⁷⁸ W. Connolly, “Lessons to be Learned: the Conflict in International Antitrust Law Contrasted with Progress in International Financial Law”, *Fordham Journal of Corporate and Financial Law*, Vol. 6, No.1, 2000, Article 6, 243.

¹⁷⁹ P. Stephan, “Global Governance, Antitrust, and the Limits of Cooperation”, *Cornell International Law Journal*, Vol. 38, 2005, 194.

¹⁸⁰ W. Connolly, “Lessons to be Learned: the Conflict in International Antitrust Law Contrasted with Progress in International Financial Law”, *Fordham Journal of Corporate and Financial Law*, Vol. 6, No.1, 2000, Article 6, 243.

¹⁸¹ Emphasis by author. J. Wayland, “International cooperation at the antitrust division”, remarks as prepared for the International Bar Association’s 16th Annual Competition Conference, Florence, 14 September 2012, 10.

¹⁸² B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 138

¹⁸³ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 259.

¹⁸⁴ J. Basedow, “Competition Policy in a Globalized Economy: from Extraterritorial Application to Harmonization” in M. Neumann & J. Weigand (eds), *The International Handbook of Competition*, Cheltenham, Edward Elgar Publishing, 2004, 329.

though it is evolving rapidly, competition law is a young branch of law, and there is too much disagreement in the international community on its meaning and function, while national sensitivities continue to play a big role.

While convergence is occurring to a certain extent, a significant divide will most likely always be there. Competition systems can be divided in roughly three categories: the US model relying on criminal and civil courts for competition law enforcement, the EU model based on an administrative system and the Asian model that depends more heavily on warnings and in which the enforcement agency is usually part of the executive.¹⁸⁵ Disagreement is omnipresent even within these larger systems. Many terms in the competition law glossary are not self-defining. For instance, nations do not agree on the meaning of what is ‘anticompetitive’ and the value and meaning of ‘efficiency’.¹⁸⁶ Such disagreement might imply that any global agreement will inevitably be incomplete, restricted to those few areas where clarity and consensus exist, and will therefore offer only limited added value.¹⁸⁷

Moreover, among the proponents of convergence of competition laws, many imply convergence towards one’s own system.¹⁸⁸ The traditional way of reaching consensus on an international level, via treaty negotiations, has failed in the field of competition law (see below, Part I, 3). What seems to be happening is that the dominant parties in the field of competition law try to promote their own competition law systems, thereby trying to create leeway to transform that system into the global standard. According to NIHOUL and LÜBBIG, however, the discussion of legal similarities and differences may cause officials to realise that significant benefits can be created through only minor policy shifts.¹⁸⁹ While this may work for some rather superficial issues, it is likely not effective with regard to the fundamentals of competition law, such as its goals or the value of economic analysis.

B) Hostage to larger issues of domestic policy

Law, including competition law, is a social construct. It stems from the domestic foundations and values of countries and adapts to social reality and experience, varying over time. Its application is based on a range of evolving economic approaches and ideologies. It is a political creation, susceptible to a wide range of domestic societal variants, and may be applied and developed in the light of other policy concerns such as social protection, consumer protection, environmental concerns, investment, or even regional development.¹⁹⁰ The link between competition and trade and industrial policy for instance, makes this topic very susceptible to lobbying and to broader concerns of domestic policy, and therefore extremely hard to harmonise. The nature and scope of the consequences of changes in competition policy onto other policies are not always predictable. Because competition policy is closely linked to and intertwined with other policy areas, harmonisation or convergence of competition policy may cause what BLAUBERGER calls sectorial or

¹⁸⁵ F. Jenny, “International Cooperation on Competition: Myth, Reality and Perspective”, *The Antitrust Bulletin*, Vol. 48, Winter 2003, 985.

¹⁸⁶ E. Fox, “GE/Honeywell: the U.S. Merger that Europe Stopped – a Story of the Politics of Convergence” in E. Fox & D. Crane (eds), *Antitrust stories*, New York, Foundation Press, 2007, 356-357.

¹⁸⁷ P. Stephan, “Global Governance, Antitrust, and the Limits of Cooperation”, *Cornell International Law Journal*, Vol. 38, 2005, 199.

¹⁸⁸ E. Fox, “GE/Honeywell: the U.S. Merger that Europe Stopped – a Story of the Politics of Convergence” in E. Fox & D. Crane (eds), *Antitrust stories*, New York, Foundation Press, 2007, 358.

¹⁸⁹ P. Nihoul & T. Lübbig, “Competition Policy: Going International?”, *Journal of European Competition Law & Practice*, Vol. 1, No. 4, 2010, 265-266.

¹⁹⁰ A. Ezrachi, “Sponge”, *Journal of Antitrust Enforcement*, Vol. 5, No. 1, 2017, 51-54.

‘diagonal’ conflicts.¹⁹¹ Competition policy does not take place in a vacuum and requires coordination with other economic policies in order to be effective, therefore the effect of changes is sometimes difficult to assess.¹⁹²

Some scholars claim that implicit consensus has already led to a system of international competition law.¹⁹³ While indeed some convergence has taken place, this has remained limited. Because of the sensitive nature of this branch of law, the “*international community moves only inches along toward an acceptable long-term solution, letting the proverbial ostrich approach win out.*”¹⁹⁴ As mentioned, part of the European business community wishes to see substantive and procedural convergence of antitrust law before entering into forms of cooperation such as the exchange of information. This approach is sometimes criticised as representing a mere indefinite delaying technique by the business community to hold on to its control over information exchange in international antitrust cases. Only when it furthers their interests, such as in a merger case, can they decide to waive their confidentiality rights, if not, they can block or hinder the investigation by not providing their consent. Advanced agency cooperation would deprive them of this control.¹⁹⁵

If harmonization is limited to mere guiding principles, the risk exists of such rules being applied ‘selectively’ or being misinterpreted or functionally interpreted because there is no true desire to harmonise to any standard other than the domestic preference. Even if principles converge, rules can still diverge.¹⁹⁶ Key competition law principles are largely similar across the world, but they only make up a skeleton.¹⁹⁷ Even if consensus existed on the objective of competition policy, for instance efficiency optimization of the sum of consumer and producer welfare, this would not necessarily lead to agreement on whether a particular regime contributes or detracts from that.¹⁹⁸

FOX believes that multilateral consensus on competition policy is possible because of a ‘spirit of cosmopolitanism’. This theory, drawing from Rawlsian arguments, puts forward that states will adhere to strong redistributive programs, embracing significant transnational wealth transfers. It is based on the premise that varying national competition policies reflect differences in local welfare and that therefore any convergence toward a global standard would entail distributional effects.¹⁹⁹ Such voluntary adherence to significant wealth distribution, however, seems very unlikely.

C) Monitoring and enforcement

¹⁹¹ M. Blauburger, “The Governance of Overlapping Jurisdictions. How International Cooperation Enhances the Autonomy of Competition Authorities”, *Transtate Working Papers*, No. 102, Bremen, 2009, 4.

¹⁹² A. Mateus, “Ensuring a More Level Playing Field in Competition Enforcement Throughout the European Union”, *Competition Law Review*, Vol. 31, No. 12, 2010, 524.

¹⁹³ First, Harry, “The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law”, *Antitrust Law Journal*, Vol. 68, No. 3, 2001, 712.

¹⁹⁴ D. Wood, “Is cooperation possible?”, *Luncheon Speech, New England Law Review*, Vol. 34, No. 1, 104.

¹⁹⁵ B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 140.

¹⁹⁶ E. Elhauge & D. Geradin, *Global Competition Law and Economics*, 2nd ed., Oxford and Portland Oregon, Hart Publishing, 2011, 1240.

¹⁹⁷ A. Ezrachi, “Sponge”, *Journal of Antitrust Enforcement*, Vol. 5, No. 1, 2017, 51-52.

¹⁹⁸ P. Stephan, “Global Governance, Antitrust, and the Limits of Cooperation”, *Cornell International Law Journal*, Vol. 38, 2005, 181.

¹⁹⁹ E. Fox, “International Antitrust and the Doha Dome”, *Virginia Journal of International Law*, Vol. 43, 2002-2003, 914, 920 (referring to a ‘cosmopolitan understanding’ of antitrust); E. Fox, “Globalization and Human Rights: Looking Out for the Welfare of the Worst Off”, *New York University Journal of International Law and Politics*, Vol. 35, 2002, as referred to in P. B. Stephan, “Global Governance, Antitrust, and the Limits of International Cooperation”, *Cornell International Law Journal*, Vol. 38., 2005, 197.

More practical problems arise as well. Monitoring and enforcement, for instance, aimed at guaranteeing uniform application, will be very difficult to organise. Harmonisation will likely require a supranational enforcement authority with dispute settlement powers. The cost of creating a joint authority is twofold. Direct costs involve funding the establishment of a new institution or the reorientation of an existing one, and allocating trained staff. The division of such costs, for instance among developed and less developed countries, already promises to be a challenging endeavour. Translation costs as well should be taken into account, which might be substantial when lacking a common vocabulary. The significant loss of sovereignty constitutes an indirect cost. Additional issues in this context relate to principal-agent problems and finding a way to ensure the neutrality and independence of the institution. DREXL, GRIMES, JONES, PERITZ and SWAINE mention the example of a merger that is consumer friendly in one member state, but harms consumers in another. In this scenario it will be very difficult to set a joint standard for review that ensures an overall balance of social welfare, perhaps by including transfer payments.²⁰⁰ A universal competition regime that increases global welfare will disadvantage some countries to the benefit of others. STEPHAN holds the rather negative view that effective monitoring of this redistribution would only clarify the magnitude of the loss particular states would experience. Oversight and dispute settlement will moreover be difficult due to the opaque and diverse interests at stake in competition policy. The diversity of objectives and the uncertainty with regard to the ‘optimal’ level of competition will furthermore necessitate elastic or broad standards rather than precise rules, which will necessarily imply high levels of discretion.²⁰¹

Apart from problems of administration and application, problems of adaptation will also emerge. Indeed, the creation but also the reform of law-based international institutions is difficult and burdensome. This inferior adaptive capability explains why *“international regimes tend to administer broad standards and norms rather than precise rules, and they tend to collapse or become irrelevant rather than reform themselves.”*²⁰² Often unanimous consent is required. An institution enforcing competition law, aiming to regulate global, fast-changing and evolving markets, will likely benefit from a flexible mandate and tools in order to adapt to changing circumstances.

2.2.3.2 Not desirable

A) Different needs and objectives result in sub-optimal rules

As mentioned, those promoting harmonisation usually have approximation towards the domestic model in mind, convinced that the latter is the most optimal form. As said by ARAUJO, *“in the debate concerning the desirability of establishing international competition rules, the focus is as much on its potential adverse impact on the policy space of national governments as it is on what conception of competition law should be favoured.”*²⁰³ In 2011, former competition commissioner ALMUNIA stated that *“engaging our world partners in dialogue and towards a growing convergence of our competition policies and enforcement is the way forward. [...] The EU*

²⁰⁰ M. Gal “International Antitrust Solutions: Discrete Steps or Causally Linked?” in J. Drexler, W. Grimes, C. Jones, R. Peritz, & E. Swaine (eds), *More Common Ground for International Competition Law?*, Cheltenham, Edward Elgar Publishing, 2011, 256.

²⁰¹ P. Stephan, “Global Governance, Antitrust, and the Limits of Cooperation”, *Cornell International Law Journal*, Vol. 38, 2005, 182, 199, 210.

²⁰² Ibid., 203.

²⁰³ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford University Press, Oxford, 2016, 180.

*competition system is one of the best, if not the best in the world.*²⁰⁴ That same year ALMUNIA also said that the dissemination of the EU's open model and principles should be the goal.²⁰⁵ The EU competition law system might be the appropriate model for the EU at a certain point in time, but it is not necessarily the case for other countries, with different economies, levels of development, industries, etcetera.

Indeed, there is no objectively 'superior' competition law. While many competition regimes share the same basic properties, the range of values, interests, and enforcement philosophies that play a role illustrate the inherently 'porous' nature of the law.²⁰⁶ Nations develop (economically) at different paces and have diverse backgrounds, capabilities, perceptions, and priorities, resulting in different needs in terms of which competition policy is suitable.²⁰⁷ They may also pursue different objectives.²⁰⁸ Many argue therefore that a uniform competition system should not be the goal, and that diversity is necessary and should be respected.²⁰⁹ Other authors claim that business cultures all over the world are not that different, and that commerce seeks to address similar economic issues and wants to achieve comparable objectives.²¹⁰ Even if the goals are alike, however, the means to reach them probably are not. Furthermore, business cultures are embedded in a broader system, and do not function on a stand-alone basis. A nation's history and its economic and cultural values and preferences may justify divergence both in needs and pursued objectives.²¹¹ Administrative, procedural and substantive differences are likely to arise because states have different policy needs and goals depending on their economic structure and level of development. Also differing political economy decisions and institutional choices cause differences.²¹²

The above does not necessarily imply that a certain degree convergence should not be pursued, but generally a one-size-fits-all solution should not be the end goal.²¹³ Domestic realities should not be overridden by a drive towards homogeneity.²¹⁴ Any international code would to a certain extent diverge from the (perceived) optimal policy for a given country.²¹⁵ As rightly put forward by

²⁰⁴ J. Almunia, "Taking Stock and Looking Forward: a Year at the Helm of EU Competition", *Revue Concurrences Conference: New Frontiers of Antitrust 2011*, Paris, 11 February 2011.

²⁰⁵ J. Almunia, "Recent Developments and Future Priorities in EU Competition Policy", *International Competition Forum St. Gallen*, 8 April 2011.

²⁰⁶ A. Ezrachi, "Sponge", *Journal of Antitrust Enforcement*, Vol. 5, No. 1, 2017, 52, 59.

²⁰⁷ M. S. Gal "Review Essay: New Perspectives on International Antitrust", *The American Journal of International Law*, Vol. 106, 2012, 409.

²⁰⁸ E. Fox, "Antitrust Without Borders – From Roots to Codes to Networks" in A. Guzman (ed.), *Cooperation, Comity, and Competition*, New York, Oxford University Press, 2011, 267.

²⁰⁹ For a detailed examination of the interplay between culture and competition policy, convincingly questioning the desirability of complete convergence of competition laws, see T. Cheng, "How Culture May Change Assumptions in Antitrust Policy" in I. Lianos & D. Daniel Sokol (eds), *The Global Limits of Competition Law*, Stanford, Stanford University Press, 2012, 205-220. CHENG put forward that the analytical framework of competition law as well as enforcement priorities require adjustment to cultural differences.

²¹⁰ H. First, "The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law", *Antitrust Law Journal*, Vol. 68, No. 3, 2001, 730.

²¹¹ S. Karamanian, "Book Review: An International Antitrust Primer: a Guide to the Operation of the United States, European Union, and Other Key Competition Laws in the Global Economy", *The American Journal of International Law*, Vol. 96, 2002, 1015.

²¹² B. Sweeney, "International Competition Law and Policy: A Work in Progress", *Melbourne Journal of International Law*, Vol. 10, 2009, 64.

²¹³ F. Jenny, "International Cooperation on Competition: Myth, Reality and Perspective", *The Antitrust Bulletin*, Vol. 48, Winter 2003, 986.

²¹⁴ A. Ezrachi, "Sponge", *Journal of Antitrust Enforcement*, Vol. 5, No. 1, 2017, 72.

²¹⁵ E. Elhauge & D. Geradin, *Global Competition Law and Economics*, 2nd ed., Oxford and Portland Oregon, Hart Publishing, 2011, 1240.

KINTNER, a global antitrust standard does not have any survival chance unless it is the result of a logical culmination of economic, political, and social developments and it did not simply arise through legislative acts.²¹⁶ ‘Forcing’ competition systems upon certain countries via international regulation would do exactly this.

B) Need for experimentation

TRITTEL considered harmonisation via a supranational mechanism to be neither realistic nor beneficial to the dynamic evolution of competition law. Instead, he believed in the value of soft convergence, whereby superior practices are identified via experimentation and other countries are offered the possibility to opt in. Despite the existence of a shared belief in the goals of adequate transparency and procedural fairness, he nevertheless believed that such goals would likely not be achieved to everyone’s satisfaction, as a result of differences in legal systems and traditions.²¹⁷ Experimentation does not imply that the goals of competition law should change every time the administration of a country has a shift in preferences, it can, however, entail that courts’ understanding of competition law evolves and adapts to the growing field of knowledge and a changing reality. Experimentation will therefore require some form of flexibility. An international code, with a supranational institution often cannot offer this kind of suppleness and openness to reform.²¹⁸ An undesirable effect of competing rules being eliminated and replaced by one set of harmonised rules is that innovation and change may be stultified to a certain extent. This concern should not be overestimated, however, as there could still be active efforts to change the one standard that prevails, as happened in the US for instance with regard to its set of securities regulation rules. Those were actively changed over time due to industry pressure or changes in regulatory philosophy.²¹⁹ Nevertheless, competition law should not become a closed system and should retain a certain amount of dynamism to address market and social realities, while retaining its conceptual core. Analytical elasticity moreover allows enforcers to experiment with ranging levels of intervention, remedies, and enforcement tools.²²⁰

C) Cost-benefit imbalance

The benefits offered by an international competition law simply do not outweigh the costs according to some.²²¹ First, convergence or harmonisation cannot solve all international antitrust problems that arise. Different factual situations in distinct national markets, for instance in the field of intellectual property rights, can result in divergent outcomes, even if the rules applied and analysis followed are similar.²²² Even if the letter of the text converges, the actual meaning of the text might still differ due

²¹⁶ E. Kintner, *Primer on the Law of Mergers*, New York, Macmillan, 1973, 63, as cited in M. Taylor, *International Competition Law: a New Dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 106.

²¹⁷ See <https://www.justice.gov/sites/default/files/atr/legacy/2012/05/04/282930.pdf> (accessed July 2017).

²¹⁸ P. Stephan, “Global Governance, Antitrust, and the Limits of Cooperation”, *Cornell International Law Journal*, Vol. 38, 2005, 188, 203.

²¹⁹ H. Scott, “International finance: rule choices for global financial markets” in A. Guzman and A. Sykes (eds), *Research handbook in international economic law*, Cheltenham, Edward Elgar Publishing, 2007, 372.

²²⁰ A. Ezrachi, “Sponge”, *Journal of Antitrust Enforcement*, Vol. 5, No. 1, 2017, 67.

²²¹ Such costs can be sovereignty costs, negotiation costs, etcetera.

²²² Competition Bureau, “Canadian perspectives on international competition cooperation”, available at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01087.html (accessed 30 April 2012).

to divergent interpretation and application to actual cases.²²³ Moreover, harmonisation should take place intensively and must reach deep to achieve the benefits attributed to it. Evolutions such as the increasing penalization of competition law, the introduction of leniency programs by more and more states, or strengthened private enforcement²²⁴ are valuable forms of convergence, but they are resource intensive and can create further difficulties instead of diminishing them if the approximation is not sufficiently substantial.²²⁵

Second, there is no certainty about how effective an imposed rule would be in containing international spillovers or about the dynamic implications it would entail.²²⁶ Harmonisation can be risky, if the method followed and the rules chosen turn out to have significant hidden drawbacks. KLODT therefore argues that “[t]he discussion so far yields that the primary goal of international policy coordination must be to curb international spillovers without impeding systems competition any more than necessary.”²²⁷ This position is understandable. When certainty on the ‘optimal approach’ and most effective rules is lacking and the full impact of legislation cannot be predicted, the danger exists that unforeseen spillovers and welfare losses occur. A safer option is then to limit oneself to minimum standards only, so no alternative remedies are excluded and evolutionary development of rules through international systems competition is not obstructed. This would prevent a supranational authority from deciding in favour of suboptimal standards thereby impeding long-term progress and innovation.²²⁸

An additional cost of establishing a uniform competition code would be that proper enforcement would require the establishment of some kind of supranational authority. It was already established that this is a cost on its own, but an additional factor is that this sort of ‘use of force’, cannot exclude the risk of abuse. This ‘commitment to international coercion’, therefore requires critical examination.²²⁹

D) Agency problems

As mentioned, it is not unthinkable that a supranational authority, or international antitrust agency or tribunal necessary to ensure the proper enforcement of the harmonised rules, is not entirely neutral itself, and this bias would be much harder to correct than in a decentralized regime. The risk exists that the agency or tribunal adopts “interpretations or enforcement policies that deviate from the views of most or all nations.”²³⁰ Moreover, ensuring complete independence from political influence will be difficult.

²²³ B. Sweeney, "International Competition Law and Policy: A Work in Progress", *Melbourne Journal of International Law*, Vol. 10, 2009, 64. For a more thorough analysis of the limits of a convergence strategy, see D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 9.

²²⁴ J. Terhechte, *International Competition Enforcement Law Between Cooperation and Convergence*, Heidelberg, Springer-Verlag, 2011, 77.

²²⁵ An example is the increasing number of unaligned leniency programs, with different deadlines and requirements, making it increasingly difficult and costly for companies to apply for leniency.

²²⁶ H. Klodt, *Towards a Global Competition Order*, Berlin, Liberal Verlag GmbH, 2005, 36.

²²⁷ Ibid., 38.

²²⁸ Ibid., 37, 39, 43.

²²⁹ P. Stephan, "Global Governance, Antitrust, and the Limits of Cooperation", *Cornell International Law Journal*, Vol. 38, 2005, 198.

²³⁰ E. Elhauge & D. Geradin, *Global Competition Law and Economics*, 2nd ed., Oxford and Portland Oregon, Hart Publishing, 2011, 1247.

STEPHAN is well-known for his critical attitude towards an international competition law. He objected to what he calls ‘the concept of international cosmopolitanism’,²³¹ and pointed to the dangers of the international administration of non-transparent regulatory programs and the dispute resolution derived from such programs.²³²

2.2.4 Benefits of enforcement cooperation: feasibility and positive competitive regulation

Enforcement cooperation offers two main benefits compared to harmonisation efforts or convergence. The first one relates to feasibility, and the second one draws from the positive effects of competitive regulation.

TERHECHTE rightly claims that case-cooperation should be prioritised over the creation of a common global foundation.²³³ This statement raises some fundamental objections. Most importantly, enforcement cooperation is a more realistic objective than harmonisation or convergence in the short-to-medium term as state sovereignty is less affected, while still being able to mediate many of the problems international competition law enforcement is currently facing. WOOD is correct when saying that international enforcement cooperation permits countries the necessary freedom to tailor the law to their own needs, while at the same time allowing international cartels to be effectively combatted without contentious jurisdictional disputes.²³⁴ Therefore, while enforcement cooperation can be considered as a possible stepping-stone towards convergence, it is a worthwhile objective in itself.²³⁵ Moreover, convergence or harmonisation are only of limited use, if for instance the evidence needed to prove a case is located in another jurisdiction and inaccessible for the competition authority handling the case.

Another important benefit is that enforcement cooperation between competition authorities may draw advantages out of the existing diversity in national competition laws. Through cooperation different competition laws worldwide continue to coexist while knowledge about them is increased. This provides impetus to continuously create and review best practices, resulting in dynamic

²³¹ A concept mainly put forward by GUZMAN and FOX, mostly revolving around a global competition law, implying an international consensus on antitrust policy and an equally international “commitment to the eradication of certain universally condemned practices.” P. Stephan, “Global Governance, Antitrust, and the Limits of Cooperation”, *Cornell International Law Journal*, Vol. 38, 2005, 196.

²³² See P. Stephan, “Regulatory Cooperation and Competition – The Search for Virtue in Transatlantic Regulatory Cooperation” in G. Bermann, M. Herdegen & P. Lindseth (eds), *Transatlantic Regulatory Co-operation – Legal Problems and Political Prospects*, Oxford, Oxford University Press, 2000, 167-202; P. Stephan, “Accountability and International Lawmaking: Rules, Rents, and Legitimacy”, *Northwestern Journal of International Law & Business*, Vol. 17, 1996-1997, 681-735; P. Stephan, “Courts, Tribunals, and Legal Unification – The Agency Problem”, *Chicago Journal of International Law*, Vol. 3, 2002, 333-352; P. Stephan, “Institutions and Elites: Property, Contract, the State, and Rights in Information in the Global Economy”, *Cardozo Journal of International and Comparative Law*, Vol. 10 2002, 305-317; P. Stephan, “The Political Economy of Choice of Law”, *Georgetown Law Journal*, Vol. 90, 2002, 957-970; P. Stephan, “International Governance and American Democracy”, *Chicago Journal of International Law*, Vol. 1, 2000, 237-256; P. Stephan, “Sheriff or Prisoner? The United States and the World Trade Organization”, *Chicago Journal of International Law*, Vol. 1, 2000, 49-74; P. Stephan, “The New International Law – Legitimacy, Accountability, Authority, and Freedom in the New Global Order”, *University of Colorado Law Review*, Vol. 70, 1999, 1555-1588.

²³³ J. Terhechte, *International Competition Enforcement Law Between Cooperation and Convergence*, Heidelberg, Springer-Verlag, 2011, 75.

²³⁴ D. Wood, “Is cooperation possible?”, Luncheon Speech, *New England Law Review*, Vol. 34, No. 1, 111.

²³⁵ OECD, Discussion on International Co-operation, Contribution of the United States, DAF/COMP/WP3/WD(2012)24, 12 June 2012, 2, footnote 2.

rewards.²³⁶ At the same time a nation's domestic preferences can continue to play a role. It can be considered a positive form of so-called competitive regulation, where confrontations can act as an incentive to improve. VAN GESTEL, MICKLITZ and MADURO see two ways of dealing with fragmentation, hybridity and polycontextuality, one focusing on unification, with central monitoring and control, and the second one focusing on the acceptance of diversity, relying on policy learning through variation and selection, also referred to as 'jurisdictional competition'. The main benefit of the latter approach is that more preferences would be satisfied if different legal regimes would compete with each other. This doctrine reminds of the 'states as laboratories' metaphor of justice BRANDEIS, putting forward the potential benefits of experimentation with different legal regimes within a federal state, such as the facilitation of innovation and the transplantation of successful parts of legal regimes to other jurisdictions. Monitoring the way in which different states deal with problems can lead to intellectual input for law reform. In this process, however, the importance of context may not be forgotten. Moreover, an important nuance is that in the absence of a truly global and transparent market for legal products, such 'legal competition' will not automatically lead to 'the greatest happiness for the greatest number'.²³⁷

2.2.5 Drawbacks of enforcement cooperation: unable to solve fundamental problems

Cooperation cannot solve all problems. One example of the limits of cooperation is the well-known *GE/Honeywell* case. This case concerned the aircraft engine maker GE that wanted to merge with avionics and non-avionics manufacturer Honeywell, causing concerns of dominance in the respective relevant markets. One of the main issues was whether GE was a dominant firm in the jet engine market, and whether a certain engine should be included in this market.²³⁸ US and EU authorities cooperated closely. JAMES, Assistant Attorney General Antitrust Division DoJ at the time testified that 'a tremendous amount' of cooperation took place during the course of the investigation. The parties even waived their confidentiality rights to allow for more intense cooperation. Frequent contact was held over the phone and during several extensive meetings between case-handlers and at the highest policy levels, among other issues about the evidence and the theories pursued.²³⁹ Both authorities could not, however, reach agreement on the appropriate outcome of the case. The US reached an agreement with both parties, but the EU blocked the merger.²⁴⁰ This was not caused by insufficient or ineffective cooperation, but "*flowed from an apparent substantive difference, perhaps a fundamental one, between the two agencies on the proper scope of antitrust law enforcement.*"²⁴¹ The US focused on the improvements for consumers that would emerge from the mergers, such as better products and more attractive prices. The EU (then EC), however, was worried about the anticompetitive effects

²³⁶ Ibid.

²³⁷ R. van Gestel, H.-W. Micklitz & M. Póiares Maduro, "Methodology in the New Legal World", EUI Working Papers LAW, 2012/13, 16-17.

²³⁸ E. Fox, "GE/Honeywell: the U.S. Merger that Europe Stopped – a Story of the Politics of Convergence" in E. Fox & D. Crane (eds), *Antitrust stories*, New York, Foundation Press, 2007, 350-351. Commission Decision declaring a concentration to be incompatible with the common market and the EEA Agreement, Case No COMP/M.2220 - General Electric/Honeywell, 3 July 2001.

²³⁹ C. James, "International Antitrust in the 21st Century: Cooperation and Convergence", address before the OECD Global Forum on Competition, Paris, 17 October 2001, 4.

²⁴⁰ One of the reasons for the different outcomes in this case is related to the correctness of the portfolio effect theory, "*a variety of different means by which a merger may allegedly create or strengthen a dominant position in non-overlap markets*". A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 45.

²⁴¹ C. James, "International Antitrust in the 21st Century: Cooperation and Convergence", address before the OECD Global Forum on Competition, Paris, 17 October 2001, 4.

the merger could have for competitors, as the efficiencies and lower prices might ultimately drive some of the competitors from the market or reduce their market shares to a point where they could no longer compete effectively.²⁴² The US as well as GE argued that a particular engine should be excluded from the market-definition, which implied that GE would no longer be a dominant firm in that market. This reasoning was rejected by the Court of Justice of the European Union (CJEU), which stated that “[t]he fact... that the United States Department of Justice apparently took [this] view... is irrelevant for the purposes of these proceedings. That the competent authorities of one or more non-member States determine an issue in a particular way for the purposes of their own proceedings does not suffice per se to undermine a different determination by the competent Community authorities. The matters and arguments advanced in the administrative procedure at Community level – and the applicable legal rules – are not necessarily the same as those taken into account by the authorities of the non-member States in question and the determinations made on either side may be different as a result. If one party considers the reasoning underpinning the conclusion of the authorities of a non-member State to be particularly relevant and equally applicable to a Community procedure, it can always raise it as a substantive argument, as the applicant has done in this instance; but such reasoning cannot be conclusive.”²⁴³ Another famous example is the *Boeing/McDonnell Douglas* case. Here again, while the US authorities approved the merger unconditionally, the European Commission could not accept it. Finally, after threats of a commercial war by the US, the Commission cleared the merger following commitments made by one of the parties.²⁴⁴

Other famous examples are the transatlantic *Microsoft* investigations. The 1993 *Microsoft* case was the first application of the EU-US Agreement.²⁴⁵ Transatlantic collaboration during the first *Microsoft* case is traditionally considered to be an ideal example of bilateral cooperation, in particular because this joint investigation took place at a time when the validity of the EU-US Agreement was being challenged before the CJEU (see below, Part II, 2.3.1). The charges were the result of close coordination between the Antitrust Division and the European Commission. The investigation was described as the first coordinated effort of the two agencies in initiating and resolving an antitrust enforcement action. Investigations happened in parallel and were practically identical. Microsoft moreover cooperated intensely with both authorities and provided a waiver of confidentiality rights so that both authorities could discuss all aspects of the investigation. It even demanded that the European Commission would participate in the DOJ's negotiations over the consent decree in order for the two investigations to be concluded concurrently.²⁴⁶ KEEGAN referred to these investigations as ‘testing ground’ for the EU-US Agreement, delivering positive effects for both the jurisdictions involved as well as Microsoft in the form of efficiency gains in information-gathering and

²⁴² Ibid. For a deeper analysis of the EU's and US' stance in the *Honeywell* case, see E. Fox, “GE/Honeywell: the U.S. Merger that Europe Stopped – a Story of the Politics of Convergence” in E. Fox & D. Crane (eds), *Antitrust stories*, New York, Foundation Press, 2007, 331-360.

²⁴³ Judgment of 14 December 2005, *General Electric Company v Commission of the European Communities*, T-210/01, ECR, EU:T:2005:456, paragraph 179.

²⁴⁴ E. Fox, “GE/Honeywell: the U.S. Merger that Europe Stopped – a Story of the Politics of Convergence” in E. Fox & D. Crane (eds), *Antitrust stories*, New York, Foundation Press, 2007, 351; J. Basedow, “Competition Policy in a Globalized Economy: from Extraterritorial Application to Harmonization” in M. Neumann & J. Weigand (eds), *The International Handbook of Competition*, Cheltenham, Edward Elgar Publishing, 2004, 324-25. Also see B. Peck, “Extraterritorial application of antitrust laws and the U.S.-EU dispute over the Boeing and McDonnell Douglas merger: from comity to conflict? An argument for a binding international agreement on antitrust enforcement and dispute resolution”, *San Diego Law Review*, No. 35, 1998, 1192.

²⁴⁵ European Commission, Press Release, “Following an undertaking by Microsoft to change its licensing practices, the European Commission suspends its action for breach of the competition rules”, IP/94/653, Brussels, 17 July 1994; *United States v. Microsoft Corp.*, 159 F.R.D. 318 (DCC 1995); *United States v. Microsoft Corp.*, 253 F.3d 34 (DCC, 2001).

²⁴⁶ B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 81-82.

prosecution and a coordinated effort resulting in a joint settlement. In this manner Microsoft did not risk the agreement reached with the US being used against it as leverage to negotiate stiffer terms in the EU.²⁴⁷ The coordinated approach, joint negotiations, and trilateral talks were not reiterated, however, in the second Microsoft case, where, despite extensive discussions, the EU and US did not act in unison, even if the Commission and the DoJ kept each other regularly informed on the state of play of their respective cases, and held meetings at regular intervals, allegedly ‘in a cooperative and friendly atmosphere’, where experiences were shared.²⁴⁸ In the second case the substantive focus of the EU and the US diverged to a rather large extent.²⁴⁹ While the European Commission and the DoJ were in contact throughout the investigation, ZANETTIN mentions “a perceived reticence on the part of the DoJ to discuss substantive issues raised by these cases with the Commission.”²⁵⁰ In the EU the case related to Microsoft’s refusal to provide competitors with information relating to its operating system source code that would allow full interoperability between Windows servers and non-Microsoft servers, as well as between Windows clients and non-Microsoft servers, and the bundling of Windows Media Player with Windows. The EU fined Microsoft and required that it would sell two versions of its Windows operating system, one with Windows Media Player and one without it, and that it publishes and licenses interoperability information.²⁵¹ In reaction, the US DoJ Antitrust Division stated that the EU’s remedy could hinder successful competitors and impose burdens on third parties, and may risk chilling innovation and competition. It blamed the EU for protecting competitors rather than competition, and referred to the rejection by a US district court of remedies similar to those imposed by the EU in US litigation.²⁵² In the US the case revolved around the fact that Microsoft had unlawfully maintained its monopoly in the market of computer-based operating systems by excluding competing middleware, mostly web browsing software, posing a threat to the Windows operating systems. The DoJ and Microsoft negotiated a settlement obliging Microsoft to provide software developers with the necessary interfaces to interoperate with its operating system, allowing for the creation of competing middleware. Manufacturers and consumers were also free to substitute competing middleware on Microsoft’s operating system.²⁵³ Even if the facts of the case were somewhat different in the EU and the US and therefore justify a different outcome in both jurisdictions, the fact that the timing of both investigations was not aligned added to the cost, delay and uncertainty of the final outcome.²⁵⁴ Exemplary of the disrupted communication is that the European Commission was only informed of the settlement between the DoJ and Microsoft by

²⁴⁷ L.E. Keegan, “The 1991 U.S./EC Competition Agreement: a glimpse of the future through the United States v. Microsoft Corp. window”, *Journal of International Legal Studies*, Vol. 2, Summer 1996, 167, 171, 174.

²⁴⁸ I. van Bael, *Due Process in Competition Proceedings*, Alphen aan den Rijn, Wolters Kluwer, 2011, 68, footnote 134; European Commission, “Microsoft - Questions and Answers on Commission Decision”, MEMO/04/70, Brussels, 24 March 2004.

²⁴⁹ The US case mostly focused on web-browsing software, and the attempt of Microsoft to maintain its monopoly in PC operating systems, while the European Commission worried about Microsoft’s attempts to leverage its market power in the area of PC operating systems into other markets, in particular into the workgroup server operating system market. The two investigations did overlap, however, in particular in the area of media players. B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 84.

²⁵⁰ Ibid.

²⁵¹ N. Economides & I. Lianos, “A critical appraisal of remedies in the E.U. Microsoft cases”, *Columbia Business Law Review*, No. 2, 2010, 346.

²⁵² A. Heimler, “EU Foreign policy tools/Competition policy”, in F. Bindi (ed.), *The foreign policy of the European Union – Assessing Europe’s role in the world*, 1st ed., Massachusetts, Brookings Institution Press, 2010, 93-94.

²⁵³ B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 83.

²⁵⁴ I. van Bael, *Due Process in Competition Proceedings*, Alphen aan den Rijn, Wolters Kluwer, 2011, 67.

means of the press.²⁵⁵ This demonstrates that successful cooperation does not depend on the existence of an agreement, but rather the specificities of the case, such as the scope of the investigation, the effect on other policies, the interests at stake, as well as the cooperation of the companies involved. If fundamental differences in analysis exist, enforcement cooperation cannot overcome this.

These cases also demonstrate that even though the competition laws of the EU and the US are similar, they can pursue different policy goals. While convergence among US and EU doctrines has certainly taken place over time, important differences remain. Some controversial areas include excessive unilateral pricing, above-cost predatory pricing, unilateral duties to deal, loyalty and volume-based discounts, vertical territorial restraints, and vertical and conglomerate mergers. Apart from deep-rooted substantial differences, another issue is that even if the rules are similar, the assessment of the facts, or the how the law applies to such facts, may differ.²⁵⁶ Moreover, while it is possible that established and deep cooperation between certain countries can overcome political considerations, such as the creation or protection of national champions, this will be the exception rather than the norm.²⁵⁷

GAL opposed enforcement cooperation via bilateral agreements on the ground that this model continued to rely on unilateral enforcement of national laws on the national territory. The final assessment of a situation remains at the national level by national agencies based on national legislation and considerations. A risk of inconsistent outcomes therefore remains very present.²⁵⁸ According to GAL such agreements are a “*poor solution to the issues of under-deterrence that result from limited resources or a limited ability to create a credible threat of enforcement.*”²⁵⁹ She even claimed that problems of clashing remedies or duplication of resources might be aggravated as more jurisdictions would be required to apply their laws.²⁶⁰ Enforcement cooperation indeed in principle does not change the substance of foreign laws, but it may, however, influence enforcement priorities, and may even act as a catalyst for other jurisdictions to adapt their competition laws and agencies.

WOOD made the remark that cooperation implies the idea of a ‘common end or effect’ agreed among the parties.²⁶¹ She asked the question, however, how broad or deep these common ends need to be. An obstacle faced by advanced enforcement cooperation is that it sometimes entails doing something for the benefit of another, without immediate return-benefit. However, the fact that assistance will not necessarily be balanced in its number of requests and number of responsive acts,

²⁵⁵ Although ZANETTIN claimed that the parties involved in the negotiation were obliged under court order not to divulge any information concerning the settlement before it was made public. B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 84.

²⁵⁶ E. Elhauge & D. Geradin, *Global Competition Law and Economics*, 2nd ed., Oxford and Portland Oregon, Hart Publishing, 2011, 1137.

²⁵⁷ Also see A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 45.

²⁵⁸ S. Scott, “A Canadian Perspective on the Role of Comity in Competition Law Enforcement in a Globalised World”, *Competition Law International*, April 2011, 69.

²⁵⁹ M. Gal, “International Antitrust Solutions: Discrete Steps or Causally Linked?” in J. Drexler, W. Grimes, C. Jones, R. Peritz, & E. Swaine (eds), *More Common Ground for International Competition Law?*, Cheltenham, Edward Elgar Publishing, 2011, 246.

²⁶⁰ Ibid.

²⁶¹ That defines the verb ‘to cooperate’ as meaning “[1] to act or work with another or others to a common end; operate jointly... [2] to act together: produce an effect jointly... [3] to associate with another or others for mutual often economic benefit...”, D. Wood, “Is cooperation possible?”, Luncheon Speech, *New England Law Review*, Vol. 34, No. 1, 106.

does not mean that cooperation is doomed from the start.²⁶² A change in mentality from a short-term to a long-term perspective is necessary. As the interconnectedness of the global economy will probably only increase, there is a growing likeliness of repeat-interactions between several competition authorities. Achieving a fair balance with regard to the assistance provided and received, should therefore become easier as well.

2.3 Formal v informal cooperation

2.3.1 Definition

International cooperation can take place formally and/or informally. The exact meaning of those terms is, however, not entirely clear. According to the 2012 OECD stocktaking exercise on the work of the Competition Committee, formal cooperation implies that *“the competition agency of one country makes a formal request of another, usually in writing, for information that the requested country has about a particular case or for assistance in gathering evidence that may exist in the requested country.”*²⁶³ Informal cooperation on the other hand consists of *“informal communications between competition agencies that are case-specific but do not involve the specific exchange of evidence that has been generated by an investigation. The agencies may discuss such matters as investigative strategies, market information and witness evaluations.”*²⁶⁴ The definitions offered are somewhat lost in a circular reasoning. The difference seems to lie in the nature of the information exchanged, namely whether it contains evidence or not. In the same year, the OECD Policy Roundtable report on improving international cooperation in cartel cases defined informal cooperation, as *“all co-operation among competition authorities that does not include sharing confidential information or obtaining evidence on behalf of another authority.”*²⁶⁵ The ECN is described as an ‘informal network’ because it does not take formal decisions and cannot require its members to act in a certain way.²⁶⁶

In the context of this study, however, the distinction between formal and informal cooperation lies in the fact whether or not communication takes place within the framework of a specific cooperation instrument. Indeed, cooperation can be based either on a legal provision, an international agreement or a waiver from one of the parties under investigation, or it can take place outside any such framework.²⁶⁷ Informal competition cooperation can in other words be described as the free and voluntary exchange of information and ideas between competition officials within legal boundaries, while formal cooperation implies that the timing, scope, manner and/or content of the cooperation is determined in an agreement or other legal instrument. Of course informal cooperation may lead to or may pave the way for formal cooperation, and formal cooperation may be complemented or even

²⁶² Ibid., 106-107. For a detailed analysis of the problems with cooperation see P. Stephan, “The Problem with Cooperation” in A. Guzman (ed.), *Cooperation, Comity, and Competition*, New York, Oxford University Press, 2011, 217-227.

²⁶³ OECD, International Co-operation – Stocktaking Exercise of the Competition Committee’s Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 30.

²⁶⁴ Ibid., 30-31.

²⁶⁵ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 39.

²⁶⁶ OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Background Note, DAF/COMP/GF(2012)6, 13 February 2012, 17.

²⁶⁷ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 7.

enabled by informal contacts.²⁶⁸ In reality cooperation will often involve a mix of formal and informal contacts.

2.3.2 Informal cooperation has benefits, but formal cooperation remains necessary

The background note of the OECD Global forum on Competition is somewhat vague on the benefits of formal international cooperation agreements. It claims that the existence of such agreements is not a guarantee for cooperation, while its absence does not necessarily preclude it. It states that it offers a formal framework for cooperation, ‘despite the legal limits’, and that it is an indication of the willingness and ability of a state or authority to hold ‘a constructive dialogue’ with foreign peers. Achieving the right balance between what can be accomplished via informal cooperation and what requires more formal mechanisms is identified as a challenge for developing countries, although this remains a challenge for more developed authorities as well.²⁶⁹

According to the 2012 OECD Roundtable Report on Improving International Co-operation in Cartel Investigations, factors contributing to the choice of a cooperation-method include “*the availability of formal instruments, contacts with and knowledge of the other authorities involved and the specific circumstances in a given case.*”²⁷⁰ The report mentions for instance that while criminal jurisdictions can make use of mutual legal assistance treaties (MLATs) and other formal forms of cooperation in criminal matters, such forms are less available to authorities in administrative jurisdictions, which make more extensive use of informal cooperation methods.²⁷¹ This is true to the extent that the procedural requirements for certain information to be admitted to trial are lower, but as soon as confidential information is at stake this is no longer an option.

A 2001 ICN survey indicated that while the US and the European Commission had made several formal requests from 1999 to 2001, such instances remained relatively infrequent.²⁷² Paradoxically, while most competition agencies did not provide any concrete examples of having used informal cooperation in cartel cases in the 2007 ICN Report on Cooperation between Competition Agencies in Cartel Investigations,²⁷³ the more recent OECD/ICN Joint Survey on international enforcement cooperation specified that informal (case) cooperation is particularly highly valued, and may suffice in many cases. Informally contacting another agency is fast and easy.²⁷⁴ The Joint Survey demonstrated that due to the increased occurrence of multijurisdictional antitrust cases, agencies have developed reciprocal relationships that allow them to informally notify each other. KLAUTER

²⁶⁸ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 47.

²⁶⁹ OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Background Note, DAF/COMP/GF(2012)6, 13 February 2012, 24.

²⁷⁰ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 13.

²⁷¹ Ibid.

²⁷² OECD, International Co-operation – Stocktaking Exercise of the Competition Committee’s Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 30-31.

²⁷³ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 9.

²⁷⁴ D. Sokol, “Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements”, University of Missouri-Columbia School of Law Legal Studies Research Paper No. 2007-13, 152.

and LACIAK confirm that cooperation among competition authorities has evolved into an informal network of daily contacts and discussions outside of a formal framework.²⁷⁵

More formalized cooperation, in the form of bilateral cooperation agreements for instance, will however remain necessary for mainly four reasons. First, procedural or organisational requirements may prevent informal cooperation. For instance, information exchanged under a formal request for assistance will often fulfil the requirements of relevant rules of civil or criminal procedure and evidence and can thus be used in trial. Information exchanged informally, while still useful for the investigation, will often not satisfy such requirements.²⁷⁶ While many competition authorities indeed emphasise the importance of informal cooperation,²⁷⁷ the US authorities, for instance, indicate that at least at the investigative stage cooperation with the DOJ mainly occurs through formal requests for assistance pursuant to MLATs or letters rogatory to seek corporate documents or to conduct witness interviews.²⁷⁸ A second example is assistance in the form of capacity building. With regard to developing countries, capacity building assistance can both provide technical expertise and foster mutual understanding, paving the way for future cooperation, but this type of cooperation can only take place in a formalized manner.²⁷⁹

A second factor is that formal cooperation (ideally) is more transparent than informal cooperation. Informal cooperation can take place in very opaque ways, for instance via personal phone calls. This lack of transparency contributes to the fact that it is so difficult to assess the effectiveness and usefulness of this type of cooperation. While a certain degree of confidentiality may be valuable to the investigation, the general lack of transparency in cooperation is not instructive for other competition agencies, nor does it create a platform for public support.²⁸⁰ Soft law cooperation agreements are often criticised as being redundant, as the cooperation mechanisms developed in such agreements can also take place informally. A benefit of using a soft law instrument that formalizes cooperation to a certain extent, however, is the transparency it creates.²⁸¹ A downside of this transparent and formalized cooperation is, however, that it will more often occur at a slower pace.²⁸²

Additionally, formalized arrangements may ensure some form of consistency in the cooperation process when there is high employee turnover resulting in weak institutional memory of the

²⁷⁵ D. Klawiter & C. Laciak, “International Competition Cooperation: No Longer Just the Formal Agreements”, *The Antitrust Review of the Americas, A Global Competition Review Special Report*, 2003, 24.

²⁷⁶ OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Contribution from the United States (DoJ), DAF/COMP/GF/WD(2012)46, 31 January 2012, 6.

²⁷⁷ See OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 13.

²⁷⁸ OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Contribution from the United States (DoJ), DAF/COMP/GF/WD(2012)46, 31 January 2012, 3.

²⁷⁹ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 39.

²⁸⁰ F. Jenny, “International Cooperation on Competition: Myth, Reality and Perspective”, *The Antitrust Bulletin*, Vol. 48, Winter 2003, 997-998.

²⁸¹ D. Sokol, “Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements”, University of Missouri-Columbia School of Law Legal Studies Research Paper No. 2007-13, 152.

²⁸² ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 16.

agency.²⁸³ While personal relationships and habits can be useful, they are more difficult to pass on. Embedding informal cooperation processes in a formal agreement, can help transfer such habits to future generations of officials and may also facilitate cooperation with newer agencies.

Finally, a formal cooperation agreement may also serve to signal a state's commitment more credibly or be part of a country's culture.²⁸⁴ DG Competition has, for instance, experienced a certain reluctance on the part of its third country peers to cooperate without an explicit provision in a bilateral agreement expressly permitting it.²⁸⁵ A formal commitment can therefore constitute a requirement for some competition authorities to engage in cooperation. In the experience of the EU formal arrangements prove particularly useful when dealing with Asian cultures. NAMBU, Deputy Secretary General for International Affairs of the Japanese Fair Trade Commission stressed that in his view formal cooperation agreements are preferable, as they establish firm lines of communication and promote further cooperation.²⁸⁶ Another example is the cooperation agreement with South-Korea, that barely differed from the existing Memorandum. The value of the cooperation agreement lay in the fact that to the Korean competition agency a formal agreement with the EU signified a confirmation of its value.²⁸⁷

2.4 Hard v soft law

Once the choice has been made to cooperate within a formal framework, this framework may be set up by hard or soft law.²⁸⁸

2.4.1 Generic definition

Soft law appears to be a *contradictio in terminis*, inciting many to attempt to define the concept. GATTO claimed that the expression 'soft law' originally referred to "*declarations, resolutions, guidelines, principles and other high levels statements [sic] by groups of States such as the United Nations, the International Labour Organization and the Organization for Economic Co-operation and Development*"²⁸⁹, emphasizing the international origins of the concept. KLABBERS considered soft law to be a type of default-category, applying in case a rule cannot be qualified as hard law, but is not 'irrelevant' either. He interpreted soft law very broadly, including guidelines, codes of conduct, resolutions, recommendations and action programmes, indeterminate provisions of treaties, unratified conventions, possibly even

²⁸³ D. Sokol, "International Antitrust Institutions" in A. Guzman (ed.), *Cooperation, Comity, and Competition*, New York, Oxford University Press, 2011, 189. Within DG COMP this issue is addressed via frequent trainings for staff and a dedicated unit for international relations.

²⁸⁴ A. Guzman, "A Compliance-based Theory of International Law", *California Law Review*, Vol. 90, 2002, 1855.

²⁸⁵ OECD, Discussion on Limitations and Constraints to International Co-operation, Contribution of the European Union, DAF/COMP/WP3/WD(2012)41, 23 October 2012, 3.

²⁸⁶ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 310-311.

²⁸⁷ Interview with Commission official.

²⁸⁸ One should take note, however, that on the one hand a binding hard law treaty can foresee informal cooperation, merely stating that the parties should meet and discuss, while a non-treaty agreement could, on the other hand, contain very detailed provisions on how the parties should cooperate and thereby create a formal framework for cooperation. D. Sokol, "Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements", University of Missouri-Columbia School of Law Legal Studies Research Paper No. 2007-13, 152.

²⁸⁹ A. Gatto, *Multinational Enterprises and Human Rights – Obligations under EU Law and International Law*, Cheltenham, Edward Elgar Publishing, 2011, 75-76, footnote 68.

opinions of Advocates-General or dissenting opinions of individual judges.²⁹⁰ Similarly, HOLMES *et al.* defined soft law as “*creating obligations that are usually imprecise and remain voluntary and are somewhat more [than] a political promise but a lot less than a binding commitment.*”²⁹¹ The most commonly encountered definition of soft law describes the concept as “*instruments that are not legally binding but can produce practical and legal effects*”.²⁹² The difference between hard and soft obligations is then that the former are legally binding and the latter are not.²⁹³ The term ‘legally binding’, is often left unspecified, but relates to third party opposability and seems to imply the existence of an enforcement mechanism or compulsory process.²⁹⁴ TAYLOR stated that hard laws can be enforced with the potential application of a range of legally mandated sanctions, while the breach of ‘morals’ as he calls it may only result in social censure and potential adverse political repercussions.²⁹⁵

2.4.2 Soft law in an international context

Apart from the generic definitions discussed above, it is relevant to discuss the concept of soft law specifically in an international context.²⁹⁶ ‘Law’ in an international context has different connotations than law in a domestic context, as a formal enforcement mechanism is often absent regarding most international legal obligations.²⁹⁷

²⁹⁰ J. Klabbers, “The undesirability of soft law”, *Nordic Journal of International Law*, Vol. 67, 1998, 385.

²⁹¹ P. Holmes, H. Müller, A. Papadopoulos, & A. Sydorak, “A Taxonomy of International Competition Cooperation Provisions”, paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 10.

²⁹² O. Stefan, “Hybridity Before the Court: a Hard Look at Soft Law in the EU Competition and State Aid Case Law”, *European Law Review*, Vol. 37, No. 1, 2012, 49. This definition is confirmed by L. Senden, *Soft Law in European Community Law*, Portland Oregon, Hart Publishing, 2004, 112, as cited in A. Schäfer, “Resolving Deadlock: Why International Organisations Introduce Soft Law”, *European Law Journal*, Vol. 12, No. 2, March 2006, 195: “*More specifically, we stick to the following definition of soft law: ‘Rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects.’*” The European Parliament adheres to the same definition. See European Parliament Resolution on Institutional and Legal Implications of the Use of ‘Soft Law’ Instruments, 2007/2028(INI), 4 September 2007, consideration K. It must be mentioned, however, that this resolution mainly deals with internal soft law EU instruments, and is not focused on the international environment.

²⁹³ O. Stefan, “Hybridity Before the Court: a Hard Look at Soft Law in the EU Competition and State Aid Case Law”, *European Law Review*, Vol. 37, No. 1, 2012, 58. This characteristic reoccurs in the definition of soft law used by STEFAN, namely normative material lacking the formal guarantees of a legally binding force (O. Stefan, “Hybridity Before the Court: a Hard Look at Soft Law in the EU Competition and State Aid Case Law”, *European Law Review*, Vol. 37, No. 1, 2012, 69) as well as the definition used by HOLMES *et al.*, (P. Holmes, H. Müller, A. Papadopoulos, & A. Sydorak, “A Taxonomy of International Competition Cooperation Provisions”, paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 10): “*A third general set of questions relates to whether an agreement under examination is legally binding for the contracting parties (hard law), or it allows contracting parties to apply these agreements on a discretionary nature (soft law).*”

²⁹⁴ Indeed, contrary to soft law, hard law is described as “*an international institutional response based on binding commitments to create domestic compliance. These commitments have third-party adjudication requirements to ensure compliance.*” D. Sokol, “Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements”, University of Missouri-Columbia School of Law Legal Studies Research Paper No. 2007-13, 113.

²⁹⁵ M. Taylor, *International competition law – A new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 362.

²⁹⁶ See for a general discussion regarding the delineation between binding and non-binding instruments in international law: O. Schachter, “The twilight existence of non-binding international agreements”, *The American Journal of International Law*, Vol. 71, No. 2, 1977, pp. 296-304; A.E. Boyle, “Some reflections on the relationship of treaties and soft law”, *International and Comparative Law Quarterly*, Vol. 48, No. 4, 2001, pp. 901-913.

²⁹⁷ A. Guzman, “A Compliance-based Theory of International Law”, *California Law Review*, Vol. 90, 2002, 1878.

The sources of international law are listed in Article 38 (1) of the Statute of the International Court of Justice.²⁹⁸ Whether instruments of soft law (in particular international agreements that do not constitute full-fledged treaties) are caught by the definitions listed in this article is subject to debate.²⁹⁹ In international law a distinction is made between treaties and ‘non-treaty agreements’.³⁰⁰ As confirmed by the Court of Justice,³⁰¹ if the parties to an agreement decide to conclude a formal treaty, this entails certain consequences. Such ‘consequences’ are described in Article 2(1)(a) of the Vienna Convention on the Law of Treaties of 1969.³⁰² Concluding a non-treaty agreement excludes the application of international treaty law, including the legal consequences resulting from the non-fulfilment of such a commitment (compensation, dispute settlement procedures, reprisals, *etcetera*).³⁰³ A non-treaty agreement is described as “*a self-contained regime whose characteristics depend on the parties’ intentions in the specific case.*”³⁰⁴ AUST stated that soft law in an international context generally refers to international instruments that are not regarded as treaties by the parties negotiating it, despite the use of mandatory language, promulgating non-legally binding principles or rules with the hope that such will become of general application. Another possibility is that the concept refers to treaty-provisions that have such a general nature that they cannot form the basis of legal rights and obligations, sometimes because the subject matter is not fully developed, or because there is no consensus on the content of the principles.³⁰⁵ This coincides somewhat with what TAYLOR called ‘unintentional soft law’: provisions in binding treaties that are so vague and/or imprecise that they cannot be enforced in practice. WEIL went even further by stating that only the latter form of soft law deserves to be labelled as such, as according to him, sub-legal obligations simply do not constitute ‘law’ at all.³⁰⁶

An example of a non-treaty agreement is an MoU (see below, Part II, 4.1.4). The effects of non-compliance with the agreement will take place in the realm of politics. The other party does not have the possibility to bring the case before an international court or tribunal, or to impose countermeasures that it might be entitled to take in the case of breach of a treaty. However, the other

²⁹⁸ “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.” Available at http://www.icj-cij.org/documents/?p1=4&p2=2&p3=0#CHAPTER_II (accessed 10 December 2013).

²⁹⁹ M. Taylor, *International Competition Law: a New Dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 360. According to HILLGENBERG, for example, non-treaty agreements are not a source of law in the sense of Article 38 (1) of the Statute of the International Court of Justice. H. Hillgenberg, “A Fresh Look at Soft Law”, *European Journal of International Law*, Vol. 10, No. 3, 1999, 499.

³⁰⁰ HILLGENBERG distinguished between what he called ‘non-treaty agreements’ and proper gentlemen’s agreements. The latter are personal commitments, while the former include government action. He also differentiated between non-treaty agreements and inter-agency agreements. Inter-agency agreements bind governments, specific ministries, or particular authorities, but not states. H. Hillgenberg, “A Fresh Look at Soft Law”, *European Journal of International Law*, Vol. 10, No. 3, 1999, 500.

³⁰¹ Judgment of 23 March 2004, *French Republic v Commission of the European Communities*, C-233/02, EU:C:2004:173.

³⁰² Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, United Nations Treaty Series, Vol. 1155, 331. Article 2 of this Convention defines ‘treaty’ as “*an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.*”

³⁰³ H. Hillgenberg, “A Fresh Look at Soft Law”, *European Journal of International Law*, Vol. 10, No. 3, 1999, 506, 513-515.

³⁰⁴ *Ibid.*, 499.

³⁰⁵ A. Aust, *Modern Treaty Law and Practice*, 3rd ed., New York, Cambridge University Press, 2013, 49-50.

³⁰⁶ M. Taylor, *International Competition Law: a New Dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 360-361.

party can resort to its general right of retorsion (retaliation by a state by means that are not illegal, such as breaking off diplomatic relations).³⁰⁷ The exact effects of soft law instruments are difficult to determine in advance.³⁰⁸ An example of the potential unexpected influence of soft law is that it could be used in court to give substantive content to vague normative standards such as ‘due diligence’.³⁰⁹ Nevertheless, while its effects are difficult to determine in advance, it is generally supported that soft law is able to affect the behaviour of nations to a considerable extent.³¹⁰

According to GUZMAN the uncertain place of soft law in the realm of international law can be attributed to negative presumptions regarding state compliance to soft law.³¹¹ The scope of this study does not allow to elaborate on the many theories on state compliance.³¹² One theory worth mentioning in this context, however, is the theory put forward by GUZMAN, originating from the frustration that “[l]egal scholarship lack[ed] a satisfactory theory of why and when states comply with international law.”³¹³ His reputational theory departs from a model of rational, self-interested states, encompassing a broader view of international law, which includes soft law, and “any promise that materially alters state incentives”, as such promises will also have a reputational impact on a state if they are breached. According to GUZMAN compliance does not so much depend on international law considerations, but rather on a cost-benefit analysis relating to both the reputational impact of a violation of an agreement, as well as the cost of compliance. When issues of profound national importance are at stake, compliance costs will likely not outweigh the reputational cost of a violation.³¹⁴

Whether or not an agreement is legally binding is approached subjectively by some scholars as depending on the intention of the parties to be bound by their commitments, claiming that international law does not contain an assumption that agreements are of a treaty nature. Another approach holds an objective view of soft law, based on the content of the rule (in this vein, see the concept of legalization below).³¹⁵ AUST identified some criteria along which to distinguish between a treaty and an MoU, but the criteria can be generalised to all types of non-treaty agreements. They include evidence of an intention to conclude (or not conclude) a treaty, terminology and form, content, express provisions as to the non-legally binding status of the document, the circumstances in which the instrument was concluded, and registration or non-registration. He adds that the will of the parties may be expressed by using carefully chosen terminology to indicate that the parties do not

³⁰⁷ A. Aust, *Modern Treaty Law and Practice*, 3rd ed., New York, Cambridge University Press, 2013, 50.

³⁰⁸ A. Schäfer, “Resolving Deadlock: Why International Organisations Introduce Soft Law”, *European Law Journal*, Vol. 12, No. 2, March 2006, 208.

³⁰⁹ A. Gatto, *Multinational Enterprises and Human Rights – Obligations under EU Law and International Law*, Cheltenham, Edward Elgar Publishing, 2011, 76.

³¹⁰ M. Taylor, *International Competition Law: a New Dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 361.

³¹¹ A. Guzman, “A Compliance-based Theory of International Law”, *California Law Review*, Vol. 90, 2002, 1879.

³¹² See for instance G. Downs & M. Jones, “Reputation, Compliance, and International Law”, *The Journal of Legal Studies*, Vol. 31, No. 1, 2002, S95-S114; K. Raustalia & A.-M. Slaughter, “International law, international relations and compliance” in W. Carlsnaes, T. Risse & B. Simmons (eds), *Handbook of International Relations*, London, Sage Publications, 2002, 538-558; B. Simmons, “Compliance with International Agreements”, *Annual Review of Political Science*, Vol. 1, 1998, 75-93.

³¹³ A. Guzman, “A Compliance-based Theory of International Law”, *California Law Review*, Vol. 90, 2002, 1826. For an overview of the inadequacies of existing legal theories such as the managerial model, the consent-based theory, the legitimacy theory, and the transnational legal process theory, and existing international relations theories such as the neorealist theory, liberal theory, and institutionalist theory, see A. Guzman, “A Compliance-based Theory of International Law”, *California Law Review*, Vol. 90, 2002, 1830-1840.

³¹⁴ *Ibid.*, 1825, 1874.

³¹⁵ H. Hillenberg, “A Fresh Look at Soft Law”, *European Journal of International Law*, Vol. 10, No. 3, 1999, 505.

intend to create international legal rights and obligations, but rather wish to write down their understandings of expected future conduct.³¹⁶

The CJEU elaborated on this matter in the case C-233/02, *French Republic v Commission of the European Communities*.³¹⁷ This case concerned the competence of the Commission to enter into an international agreement with the US, namely the Guidelines on Regulatory Cooperation and Transparency. The case reflected the increasing intolerance of Paris regarding the perceived ‘soft institutionalisation’ that was engaged in by EU and US officials to govern their transatlantic relationships. The Guidelines were developed within the framework of the Action Plan created for the Transatlantic Economic Partnership, which contained in the section on technical barriers to trade a paragraph on regulatory cooperation. The interest on the part of the US to develop guidelines on regulatory cooperation with the EU was not surprising as the EU market would soon grow with ten new member states, that would adhere to the rules decided on in Brussels.³¹⁸ Because the Commission only lacks the competence to conclude *legally binding* international agreements, the central issue in this case was whether the agreement was binding in nature.³¹⁹ The French government relied on the content of the agreement to classify it as a legally binding international agreement. According to the French government, although the language of the guidelines was carefully selected, the provisions were complete and operational in nature, setting out precise objectives, the field of application and the measures to be taken and therefore constituted “*a legal instrument which is sufficiently detailed to reflect a commitment entered into by bodies subject to international law and which has binding force for the latter.*”³²⁰ The Commission, however, maintained that the Guidelines were not legally binding. It was convinced that the intention of parties to enter into binding commitments could be “*the only decisive criterion in international law for the purpose of establishing the existence of binding effect.*”³²¹ This intention allegedly emerged from the text, structure, and context of the Guidelines.

The Court, rather unconvincingly, took the same stance as the Commission, clarifying that “*the intention of the parties must in principle be the decisive criterion for the purpose of determining whether or not the Guidelines are binding.*”³²² The use of the words ‘in principle’ suggests that exceptions are possible, but the Court did not elaborate on what possible deviations from this principle could be. This intention was found both the text of the Guidelines and the history of the negotiations, where the Commission repeatedly emphasized the voluntary, non-binding nature of the obligations. The Court recalled that both the Transatlantic Economic Partnership and the Action Plan were approved by the Council, and that the committee set up pursuant to Article 133(3) EC was regularly informed of the progress of the negotiations.³²³ By reiterating the steps that led to the development of the Guidelines,

³¹⁶ A. Aust, *Modern Treaty Law and Practice*, Third Edition, New York, Cambridge University Press, 2013, 17-18, 29- 35.

³¹⁷ Judgment of 23 March 2004, *French Republic v Commission of the European Communities*, C-233/02, EU:C:2004:173.

³¹⁸ E. Baroncini, “La Cour de justice et le treaty making power de la Commission européenne depuis l’Accord de coopération dans l’application des régimes antitrust jusqu’à l’Accord sur les orientations en matière de coopération normative et de transparence”, *Revue du Droit de l’Union Européenne*, No. 2, 2006, 401-403, 409.

³¹⁹ Judgment of 23 March 2004, *French Republic v Commission of the European Communities*, C-233/02, EU:C:2004:173, paragraph 36.

³²⁰ *Ibid.*, paragraph 29.

³²¹ *Ibid.*, paragraph 32.

³²² Emphasis by author. *Ibid.*, paragraph 42.

³²³ *Ibid.*, paragraph 41-44.

the Court demonstrated that the Commission had respected the division of competences and the institutional balance foreseen in the Treaty with regard to the Common Commercial Policy.³²⁴

Surprisingly, the Court avoided to rule on the admissibility of the claim. The Commission had put forward that the Guidelines constituted an administrative arrangement, which therefore could not be the subject-matter of an action for annulment, and even if the Guidelines were considered binding, they did not lay down or produce legal effects and therefore could not be challenged. Contrary to established case-law, where the decision on admissibility precedes the judgment on the substance, the Court merely stated that “*the Court takes the view that given the circumstances in the present case, it is not necessary to rule on the objections as to admissibility raised by the Commission, since the form of order sought by the French Republic must in any event be dismissed on the substance.*”³²⁵ This is not merely ‘annoying’ or illogical. By deciding on the substance of the matter and declaring that the Guidelines do not have binding force, the Court has, for the first time, extended its legality control to acts without legal effect. Generally, if an analysis of the admissibility indicated that the act under scrutiny did not hold legal effects, the action for annulment was void. Some clarity on what exactly constitute ‘legal effects’ would have been very welcome.³²⁶

The Court did not only proceed to assess the legality of an act lacking legal effect rather than declaring the call for annulment inadmissible, it moreover specified that an act such as the Guidelines can only be concluded by the Commission after a process of consultation involving the Council and other competent committees. France’s action, while not succeeding in getting the Guidelines to be declared void, can nevertheless be considered a victory for the applicant in that the judgment established first, the competence of the Court to rule on substance regarding an act such as the Guidelines, and the need for prior political consensus for a non-binding act to be legally adopted.³²⁷ BARONCINI opined that the judgment was ambiguous and not entirely convincing. She rightly suggested that because it was clear that the Guidelines are normative in nature, rather than labelling them as non-binding, it would have been preferable to state that the parties meant to establish best efforts obligations rather than obligations to achieve a result, and meant to interfere minimally with the discretionary powers of the agencies involved (in this context, see the concept of legalization below).³²⁸

This judgment came ten years after France had similarly requested that the agreement between the Commission and the government of the United States regarding the application of their competition laws be declared void, based on the Commission’s alleged lack of competence to conclude the agreement. This judgment is elaborately discussed in Part II (see below, Part II, 2.3.1). In this context, however, it can already be stated that in this case as well, the Court had to decide on the legally binding nature of the agreement, and did so in a dubious way. The Court first stated very

³²⁴ E. Baroncini, “La Cour de justice et le treaty making power de la Commission européenne depuis l’Accord de coopération dans l’application des régimes antitrust jusqu’à l’Accord sur les orientations en matière de coopération normative et de transparence”, *Revue du Droit de l’Union Européenne*, No. 2, 2006, 417-418.

³²⁵ Judgment of 23 March 2004, *French Republic v Commission of the European Communities*, C-233/02, EU:C:2004:173, paragraph 4-6.

³²⁶ E. Baroncini, “La Cour de justice et le treaty making power de la Commission européenne depuis l’Accord de coopération dans l’application des régimes antitrust jusqu’à l’Accord sur les orientations en matière de coopération normative et de transparence”, *Revue du Droit de l’Union Européenne*, No. 2, 2006, 416.

³²⁷ *Ibid.*, 427-428.

³²⁸ « *il y a là une certaine dose d’ambiguïté puisque la Cour affirme que les Lignes directrices sont ‘dépourvues de force contraignante’, mais reconnaît en même temps qu’il s’agit d’ ‘un acte visant à réduire les risques de divergences liés à l’existence d’obstacles techniques aux échanges de biens’.* » *Ibid.*, 429.

briefly that “as is apparent from its actual wording, the Agreement is intended to produce legal effects.”³²⁹ Then it reiterated that the Community alone has the capacity to bind itself internationally, continuing that “[t]here is no doubt, therefore, that the Agreement is binding on the European Communities.”³³⁰ The causality in the line of thought of the Court is far from clear. The Court is of the opinion that the Agreement fits the definition of an international agreement within the meaning of Article 2(1)(a)(i) of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 21 March 1986. Non-performance of the Agreement could then result into international liability for the Community. Appreciation of the intention of the parties to the agreement was much less present, if not totally absent, in the 1994 judgment of the Court. It is equally surprising that in the 2004 judgment, the Court did not refer to its Opinion 1/75,³³¹ nor to the Vienna Convention.³³² Most recently, with regard to the definition of an agreement according to international law, the Court in its Opinion 1/13 confirmed that it interprets the concept of ‘agreement’, both under the law of treaties and for the purposes of EU law, in a broad way. It states that, in the context of the Convention on the Civil Aspects of International Child Abduction, “the act of accession and the declaration of acceptance of such an accession, although each is effected by means of a separate instrument, give expression, overall, to the ‘convergence of intent’ of the States concerned and thus amount to an international agreement.”³³³ Two unilateral statements can therefore nevertheless be considered to form an international agreement.³³⁴

Around the same time that the Court of Justice ruled on the issue of the legally binding nature of the EU-US Agreement, so did the International Court of Justice (ICJ), in its 1994 case ‘*Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Jurisdiction and Admissibility)*’. In this case one of the central questions was whether the Minutes that were signed by the parties, referring to the consultation between the two foreign ministers of Bahrain and Qatar and that noted what had been ‘agreed’ between the parties, constituted a binding treaty under international law. The ICJ first assessed the ‘nature’ of the text, and only then the ‘content’. It reiterated that international agreements can have different forms and have a diversity of names, referring to the definition of treaty in the Vienna Convention on the law of treaties of 1969. The ICJ is of the opinion that the ‘actual terms’ of an agreement and the circumstances in which it was drawn up should be the main factors to ascertain whether a treaty has been concluded.³³⁵ The Court continued that the Minutes

³²⁹ Judgment of 9 August 1994, *French Republic v Commission of the European Communities*, C-327/91, EU:C:1994:305, paragraph 15.

³³⁰ *Ibid.*, paragraph 23-25.

³³¹ Opinion 1/75 of the Court of 11 November 1975, EU:C:1975:145, elaborating on the meaning of the word ‘agreement’ in former Article 228 EEC. The Court did refer to this Opinion in aforementioned case C-327/91 (paragraph 27).

³³² N. Lavranos & R.H. van Ooik, “Noot: Zaak C-233/02, Franse Republiek t. Commissie van de Europese Gemeenschappen (‘EG-VS Richtsnoeren’), *SEW Tijdschrift voor Europees en economisch recht*, No. 12, December 2004, 545.

³³³ Opinion of the Court of 14 October 2014, *Convention on the civil aspects of international child abduction*, Opinion 1/13, EU:C:2014:2303.

³³⁴ For an analysis of the broader implications of this Opinion post-Lisbon, see I. Govaere, “Setting the international scene: EU external competence and procedures post-Lisbon revisited in the limelight of CJEU Opinion 1/13”, *Common Market Law Review*, Vol. 52, No. 5, 2015, 1277-1308.

³³⁵ It should be pointed out that the ICJ takes a different stance when it concerns the legal power of unilateral statements, as demonstrated in the *Nuclear Test Case* of 1974. The ICJ in this case attributed particular importance to the intention of France when issuing its declarations. (Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, 112, paragraph 46.) The ICJ therefore employs a different analysis when deciding on the legal nature of, on the one hand, agreements between two or more parties, and on the other hand unilateral statements by a state. (N. Lavranos & R.H. van Ooik, “Noot: Zaak C-233/02, Franse Republiek t.

were not a simple record of a meeting, and took an entirely different stance than the CJEU when it did not find it necessary to consider the likely intentions of the Foreign Minister of Bahrain or Qatar. The ICJ finally concluded that the Minutes constituted an international agreement that created rights and obligations for the Parties.³³⁶

2.4.3 The concept of legalization

The definitions of soft law covered so far consider the legally binding nature of the rule to be the main factor in categorising a rule as either hard or soft law, the dividing line being constituted by the intention of the parties according to the Court. This distinction, however, is rather artificial. Some scholars, therefore, put forward that the reality consists of a whole spectrum, or continuum, of ‘softer’ and ‘harder’ law, an approach that is supported by this study. The European Parliament as well recognised that in the first place “[...] the notion of soft law, based on common practice, is ambiguous and pernicious” and that “[...] the distinction between *dura lex/mollis lex*, being conceptually aberrant, should not be accepted or recognised.”³³⁷ The distinction between hard and soft law for the purpose of this study is not considered to be a binary one. Rather, international agreements are seen to cover a whole spectrum of commitment.³³⁸ Since competition law is a fairly technical topic on which there exists some form of consensus on the practices that should be condemned, but much less agreement on the specific approach that should be followed, DAVIDOW and CHILES remarked that instruments dealing with restrictive business practices will fall somewhere between both extremes.³³⁹

GUZMAN identified at least two dimensions along which the level of commitment of the parties can be adjusted, namely the formality and the clarity of an agreement.³⁴⁰ In line with the ‘continuum approach’, ABBOTT, KEOHANE, MORAVCSIK, SLAUGHTER and SNIDAL have further developed and refined this approach via what they call ‘the concept of legalization’. According to this concept, the place of a rule along the continuum between hard and soft law is determined according to three characteristics: obligation, precision, and delegation. As a legal rule is weakened along one or more of those three dimensions, the realm of soft law begins. The variety that is possible along the three aforementioned dimensions results in a great diversity of ‘harder’ and ‘softer’ law.³⁴¹ A clear distinction must be made, however, between the nature of an agreement and its content or

Commissie van de Europese Gemeenschappen (‘EG-VS Richtsnoeren’), SEW Tijdschrift voor Europees en economisch recht, No. 12, December 2004, 545.

³³⁶ Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, 112, paragraphs 13, 21-24, 27, 30.

³³⁷ European Parliament Resolution on Institutional and Legal Implications of the Use of ‘Soft Law’ Instruments, 2007/2028(INI), 4 September 2007, considerations A & B.

³³⁸ Also see O. Stefan, “Hybridity Before the Court: a Hard Look at Soft Law in the EU Competition and State Aid Case Law”, *European Law Review*, Vol. 37, No. 1, 2012, 58 footnote 69, 60; E. Korkea-aho, “EU Soft Law in Domestic Legal Systems: Flexibility and Diversity Guaranteed?”, *Maastricht Journal of European and Comparative Law*, Vol. 16, 2009, 271, 289; A. Guzman, “A Compliance-based Theory of International Law”, *California Law Review*, Vol. 90, 2002, 1828, 1881.

³³⁹ J. Davidow & L. Chiles, “The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct regarding Restrictive Business Practices”, *The American Journal of International Law*, Vol. 72, No. 2, 1978, 250.

³⁴⁰ A. Guzman, “A Compliance-based Theory of International Law”, *California Law Review*, Vol. 90, 2002, 1857.

³⁴¹ Even the ‘extremes’ of the spectrum are not straightforward. It is not the case that the ‘hard end’ equates with law and the ‘soft end’ with politics, because politics continue to play even where there is law. Indeed, there is no rigid dichotomy between ‘legalization’ and ‘world politics’, but law and politics are intertwined at all levels. K. Abbott, R. Keohane, A. Moravcsik, A.-M. Slaughter & D. Snidal, “The Concept of Legalization”, *International Organization*, Vol. 54, No. 3, 2000, 404, 409, 419, 422.

stringency. A formal treaty could contain the same obligations as, for instance, a conference declaration,³⁴² and non-treaty agreements can be as complete as a proper international treaty.³⁴³

The concept of legalization is empiricist in origin and was tailored to the reality of international relations. Obligation measures the degree in which the subjects of a rule are bound by it and the extent to which their behaviour is scrutinized under international and domestic law.³⁴⁴ ABBOTT *et al.* point out that legal obligations differ from obligations resulting from coercion or morality alone, as the former “bring into play the established norms, procedures, and forms of discourse of the international legal system.”³⁴⁵ An agreement can be binding in many ways, but it is either binding under international law or not.³⁴⁶ As mentioned, this distinction is classically used to determine the difference between hard and soft law. ‘Obligation’ relates to the fundamental international legal principle of *pacta sunt servanda*.³⁴⁷ If the legal commitments are broken, accepted procedures and remedies are foreseen by the international legal system to ensure reparation. Entering into a formal treaty therefore expresses the intent of the parties to create legally binding obligations that are governed by international law. Under legally binding agreements states can assert legal claims, engage in legal discourse, invoke legal procedures, and resort to legal remedies. This is not possible under non-legally binding instruments, where states can make normative claims, engage in normative discourse, and resort to political remedies.³⁴⁸ Breach of a non-treaty agreement can be seen as ‘an unfriendly act’ and can be responded to with countermeasures and retaliation inherent in the system.³⁴⁹ The distinction may not always be very clear. Many techniques can be used to create variety in the level of obligation. This sometimes results in surprising and confusing contrasts between form and substance. These techniques include contingent or hortatory obligations, escape clauses, or simply allowing withdrawal of the agreement after a specified notice period. Alternatively, seemingly unconditional obligations can be created by institutions without direct law-creating authority. The legal implications can therefore be quite contested.³⁵⁰

This first factor therefore aligns with the classical binary approach. The concept of legalization goes beyond this by adding the factor of precision. HILLGENBERG believes that the level of precision of an agreement is not an appropriate criterion for determining the binding or non-binding nature of an agreement.³⁵¹ The concept of legalization takes this criterion into account, but it is not the only relevant factor. Precision refers to the extent to which a rule unambiguously defines the required or forbidden behaviour in a precise and elaborate way, or rather sticks to vague principles.³⁵² A formal, legally binding treaty may contain obligations that are so vague that they cannot be properly enforced

³⁴² Ibid., 402.

³⁴³ H. Hillgenberg, “A Fresh Look at Soft Law”, *European Journal of International Law*, Vol. 10, No. 3, 1999, 507.

³⁴⁴ K. Abbott, R. Keohane, A. Moravcsik, A.-M. Slaughter & D. Snidal, “The Concept of Legalization”, *International Organization*, Vol. 54, No. 3, 2000, 403, 405.

³⁴⁵ Ibid., 408-409.

³⁴⁶ H. Hillgenberg, “A Fresh Look at Soft Law”, *European Journal of International Law*, Vol. 10, No. 3, 1999, 507.

³⁴⁷ This principle implies that those who engage in a legalised international agreement are obliged to follow the obligations and rules in the agreement, and not disregard them as soon as preferences change. They should execute the agreement in good faith.

³⁴⁸ K. Abbott, R. Keohane, A. Moravcsik, A.-M. Slaughter & D. Snidal, “The Concept of Legalization”, *International Organization*, Vol. 54, No. 3, 2000, 409-411.

³⁴⁹ H. Hillgenberg, “A Fresh Look at Soft Law”, *European Journal of International Law*, Vol. 10, No. 3, 1999, 514.

³⁵⁰ K. Abbott, R. Keohane, A. Moravcsik, A.-M. Slaughter & D. Snidal, “The Concept of Legalization”, *International Organization*, Vol. 54, No. 3, 2000, 411-412.

³⁵¹ H. Hillgenberg, “A Fresh Look at Soft Law”, *European Journal of International Law*, Vol. 10, No. 3, 1999, 500.

³⁵² K. Abbott, R. Keohane, A. Moravcsik, A.-M. Slaughter & D. Snidal, “The Concept of Legalization”, *International Organization*, Vol. 54, No. 3, 2000, 404-405.

or that make it nearly impossible to assess compliance.³⁵³ The more precise a rule is formulated, the narrower the scope for reasonable interpretation becomes. In case of a precise rule, non-acceptable behaviour is largely defined *ex ante* by the legislator, whereas when the rule is rather imprecise, this determination is made *ex post*.³⁵⁴ TAYLOR claimed that a distinctive feature of international soft law is that it “*has avoided the need to express matters in black and white terms and has therefore remained consistent with the approach of international diplomacy and its myriad nuances and shades of grey.*”³⁵⁵ He explained that this is achieved via so-called ‘studied ambiguity’, namely “*the use of deliberate ambiguity to gloss over differences between nations when expressing international agreement.*”³⁵⁶ A benefit of this technique is that it can create an atmosphere of agreement, promoting cooperation, but a drawback is that it may not result in actual effects.³⁵⁷

Delegation is the third factor contributing to the concept of legalization. It refers to the extent to which designated third parties are authorised to implement, interpret and apply the rules, be it a court, arbitrator or administrative organ.³⁵⁸ Such a delegation of authority to interpret certain rules, often to an international body or the judiciary, can limit the discretion that accompanies imprecise rules.

While variation along each factor is possible, there is a certain degree of interdependency. For instance, high delegation will very often be accompanied by a high level of legal obligation. Nevertheless, the authors of ‘The concept of legalization’ indicate that not all factors are weighed equally. The dimension of obligation should be weighed most heavily, and the precision-dimension carries the least weight. Reasons for this imbalance, however, are not provided. Many of the factors used to distinguish between hard and soft law seem to indicate the extent to which compliance can be assessed and the law is enforceable. Rather than looking for signs indicating the intentions of the parties to determine the legally binding nature of an agreement, indications of enforceability such as obligation, precision, and delegation might give a clearer image of the level of commitment the parties were willing to accept.

2.4.4 Benefits of soft law

In this section the benefits and drawbacks of soft law are analysed. How and to what extent these benefits apply in the context of international competition cooperation in particular will become apparent in Part II of this study. Before identifying the main benefits and drawbacks of ‘soft law’ in its various forms, it is important to note that one particular form of legalization is not inherently superior to another.³⁵⁹ Many authors believe in the distinct benefits of soft law as a full-blown

³⁵³ “According to Lauterpacht, they are ‘provisions... void and inapplicable on account of uncertainty and unresolved discrepancy’.” H. Hillgenberg, “A Fresh Look at Soft Law”, *European Journal of International Law*, Vol. 10, No. 3, 1999, 500. Also see K. Abbott, R. Keohane, A. Moravcsik, A.-M. Slaughter & D. Snidal, “The Concept of Legalization”, *International Organization*, Vol. 54, No. 3, 2000, 412-415.

³⁵⁴ A problem can be that imprecise norms are sometimes interpreted and applied by the very actors whose conduct they are intended to govern. A centralised legislature is often lacking to overturn inappropriate, self-serving interpretations.

³⁵⁵ M. Taylor, *International competition law: a new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 363.

³⁵⁶ *Ibid.*, 363.

³⁵⁷ *Ibid.*, 363.

³⁵⁸ K. Abbott, R. Keohane, A. Moravcsik, A.-M. Slaughter & D. Snidal, “The Concept of Legalization”, *International Organization*, Vol. 54, No. 3, 2000, 401, 412-415.

³⁵⁹ *Ibid.*, 408.

alternative for hard law in certain situations.³⁶⁰ MARSDEN, for example, a strong promotor of soft law and informal cooperation, stated that in the context of international competition law cooperation binding rule-making has simply ruled itself out by not happening.³⁶¹ ABBOTT and SNIDAL claimed that soft law offers some of the same benefits as hard law, while also overcoming some of its costs, and adding some independent advantages of its own.³⁶² Soft law undeniably has distinct own benefits, and while it can lead to harder forms of law, this is not its only merit, and this is also not a guarantee. Indeed, “[h]ard law is probably more likely to evolve from soft law than from (utopian) plans to create hard law full-blown. But this does not imply that all soft legalization is a way station to hard(er) legalization, or that hard legalization is the optimal form.”³⁶³ Soft law can be useful in particular contexts, but not in all.³⁶⁴ As ABBOTT and SNIDAL put it, “international legalization is a diverse phenomenon because it helps a diverse universe of states and other actors resolve diverse problems.”³⁶⁵ Different levels of soft law can be more effective and efficient in different circumstances.³⁶⁶

2.4.4.1 Flexibility in procedure and effects

One argument opposing hard law is that once negotiated rules are formalised, they are difficult to change and adapt to societal and other evolutions, thus risking obsolescence.³⁶⁷ Indeed, soft rules can generally be produced and changed via less stringent procedures and therefore seem more appropriate in a rapidly changing environment, as the formality of a rule and its ‘hard’ of ‘soft’ nature will often be closely interlinked. The emergence of the use of soft law was indeed explained by HEATHER and LOBRANO by the fact that the rapid expansion of competition laws combined with stronger antitrust agencies did not allow antitrust to proceed through legislative changes and formal treaties.³⁶⁸

Moreover, soft rules offer flexibility by allowing states to adjust their commitments to their particular domestic political and economic conditions, “rather than trying to accommodate divergent national circumstances within a single text.”³⁶⁹ Not all parties are equally ready for legalization due to differences in

³⁶⁰ See, for instance, H. Hillgenberg, “A Fresh Look at Soft Law”, *European Journal of International Law*, Vol. 10, No. 3, 1999, 515; K. Abbott & D. Snidal, “Hard and Soft Law in International Governance”, *International Organization*, Vol. 54, No. 3, 2000, 422-423.

³⁶¹ P. Marsden, “‘Jaw-jaw’ not ‘law-law’ – from treaties to meetings: the increasing informality and effectiveness of international cooperation” in A. Ezrachi (ed.), *Research Handbook on International Competition*, Cheltenham, Edward Elgar Publishing, 2012, 126.

³⁶² K. Abbott & D. Snidal, “Hard and Soft Law in International Governance”, *International Organization*, Vol. 54, No. 3, 2000, 423.

³⁶³ *Ibid.*, 447.

³⁶⁴ Also see A. Bradford, “International Antitrust Cooperation and the Preference for Nonbinding Regimes” in A. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 337.

³⁶⁵ K. Abbott & D. Snidal, “Hard and Soft Law in International Governance”, *International Organization*, Vol. 54, No. 3, 2000, 455.

³⁶⁶ *Ibid.*, 423.

³⁶⁷ R. Tittel, “Is a multilateral Framework Necessary?”, WTO Regional Workshop on Competition Policy, Cape Town, 22-24 February 2001, at <http://www.ftc.gov/bc/international/docs/wtocapetown.pdf> (accessed December 2011).

³⁶⁸ S. Heather & G. Lobrano, “I’d Like to Propose a Toast: Marking the 20th Anniversary of US-EU Antitrust Cooperation”, *CPI Antitrust Chronicle*, Vol. 1, 2011, 3, as cited in P. Marsden, “‘Jaw-Jaw’ Not ‘Law-Law’ – From Treaties to Meetings: the Increasing Informality and Effectiveness of International Cooperation” in A. Ezrachi (ed.), *Research Handbook on International Competition Law*, Cheltenham, Edward Elgar Publishing, 2012, 119.

³⁶⁹ K. Abbott & D. Snidal, “Hard and Soft Law in International Governance”, *International Organization*, Vol. 54, No. 3, 2000, 445.

the domestic situation. Some countries' institutions, laws, or personnel restraints do not allow the implementation of hard commitments.

2.4.4.2 Less contracting costs and less implementation costs

A consequence of this flexibility is that soft law generally entails less contracting and implementation costs than hard law. The negotiation of soft law will become more attractive to states as the contracting costs of hard law increase. These contracting or negotiation costs include relatively mechanical costs such as the number of actors involved in the negotiation process and the procedures to be followed. Approval and ratification by the legislator is a time- and resource-consuming complex process, that can sometimes be avoided if the negotiated rules are not legally binding. Softer forms of law allow states to test the consequences of their agreement. This type of learning process will often lower the perceived costs of subsequent moves to harder legalization. Depending on the formality of the agreement and precision of the obligations, soft law moreover entails less costs when renegotiation is needed in light of new information.³⁷⁰ Not all possible contingencies can be foreseen by an international agreement, no matter how complex it is or how many reservations, exceptions, or escape clauses it contains.

Implementation costs mainly concern the gravity of the distributional effects of the agreement and therefore to a large extent align with 'sovereignty costs', meaning the limitations imposed on the sovereign will of the state following the agreement. Sovereignty costs vary, and can range from minor differences in the outcome of particular issues, to loss of authority over decision making in certain field. The highest sovereignty costs are encountered in the case the traditional hallmarks of sovereignty are touched upon, such as the relation between a state and its citizens or territory.³⁷¹ Some sovereignty costs can be unanticipated. Potential legislative reforms are costly, and the impact of a reform on other enforcement policies can be difficult to predict.³⁷² Delegation entails this risk to a large extent.³⁷³

Soft law often allows a certain degree of case-by-case cooperation, or cherry-picking, permitting states to capture the benefits of cooperation only where the perceived benefits outweigh the perceived costs.³⁷⁴ This way, states may more easily choose for so-called 'efficient breach of contract'. Soft law offers parties the opportunity to signal their willingness to engage, while limiting the consequences in case a party at some point violates part of the agreement.³⁷⁵ Parties to a non-binding agreement avoid the risk of breaching international law when they ignore their obligations under the agreement.³⁷⁶ They avoid this risk if they are ultimately unable or unwilling to comply with their obligations and can to a large extent hold on to the control they have over their domestic laws, but

³⁷⁰ Ibid., 434-436, 444.

³⁷¹ Ibid., 436-437.

³⁷² OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 84.

³⁷³ K. Abbott & D. Snidal, "Hard and Soft Law in International Governance", *International Organization*, Vol. 54, No. 3, 2000, 438.

³⁷⁴ A. Bradford, "International Antitrust Cooperation and the Preference for Nonbinding Regimes" in A. Guzman (ed.), *Cooperation, Comity, and Competition*, New York, Oxford University Press, 2011, 331. An important side note, however, is that while this is a benefit for the agencies involved, it is not the case for the business community that gains little certainty.

³⁷⁵ A. Guzman, "A Compliance-based Theory of International Law", *California Law Review*, Vol. 90, 2002, 1856.

³⁷⁶ H. Hillgenberg, "A Fresh Look at Soft Law", *European Journal of International Law*, Vol. 10, No. 3, 1999, 499. Reputational costs may, however, not be underestimated.

still capture some of the gains of international cooperation.³⁷⁷ While states often retain the possibility to withdraw from a legally binding agreement, “*processes of enmeshment may make it increasingly costly for them to do so.*”³⁷⁸ Softer legalization implies that via the inclusion of escape clauses, imprecise commitments or particular forms of delegation states can maintain future control in the occurrence of adverse circumstances and thereby dampen security and distributional concerns.³⁷⁹

While soft law reduces negotiation and implementation costs, it does come at a charge of its own. Hard law can offer stable commitment via several international and domestic institutions and procedures, giving the committed actors both normative and reputational arguments to maintain their policy, while softer law may necessitate frequent renegotiations and persuasion, being costly activities.³⁸⁰ BRADFORD argued that the multitude of soft bilateral, plurilateral, and multilateral governance instruments, taken together, are more costly than the negotiation of a more ‘comprehensive’ single binding international antitrust agreement. She did add, however, that this is only so “*provided that such an agreement was feasible to reach.*”³⁸¹

2.4.4.3 Generally equally effective as hard law on the international scene

Whenever there is no simultaneous execution of obligations, it is crucial to have credible commitments and assurances. Generally, appropriate enforcement mechanisms can offer this credibility. However, in international law, even ‘hard’ international law encounters difficulties with enforcement, and cannot be compared to domestic enforcement via the power of the state. Even where enforcement mechanisms are in place, the wish not to disturb diplomatic relations may prevent them from ever being used.

An often-heard argument is that in fact, hard and soft international law have the same effect. SLAUGHTER believes that soft law, via international guidance through principles, guidelines, codes, standards, best practices or other non-legal instruments is actually as powerful as hard law.³⁸² HILLGENBERG confirmed that the level of compliance for non-treaty agreements and treaties is largely the same.³⁸³ The remark must be made that soft law is not equally effective as hard law for all issues. In the field of competition law, while soft law is appropriate for matters such as coordination or procedural harmonization, it has less success with subjects where substantive disagreement exists and where national legislation needs to be amended, as is the case with for instance the exchange of confidential information. It is commonplace to state, among public international law scholars, that state behaviour can only be changed by binding international rules and the underlying belief of *pacta sunt servanda*. However, international relations scholarship has expressed scepticism with regard to the impact of binding treaties. It is believed that “[i]f states want out of a commitment, they will build in an

³⁷⁷ A. Bradford, “International Antitrust Cooperation and the Preference for Nonbinding Regimes” in A. Guzman (ed.), *Cooperation, Comity, and Competition*, New York, Oxford University Press, 2011, 333.

³⁷⁸ K. Abbott & D. Snidal, “Hard and Soft Law in International Governance”, *International Organization*, Vol. 54, No. 3, 2000, 437.

³⁷⁹ *Ibid.*, 435, 439.

³⁸⁰ *Ibid.*, 431.

³⁸¹ A. Bradford, “International Antitrust Cooperation and the Preference for Nonbinding Regimes” in A. Guzman (ed.), *Cooperation, Comity, and Competition*, New York, Oxford University Press, 2011, 332.

³⁸² P. Marsden, “‘Jaw-jaw’ not ‘law-law’ – from treaties to meetings: the increasing informality and effectiveness of international cooperation” in A. Ezrachi (ed.), *Research Handbook on International Competition*, Cheltenham, Edward Elgar Publishing, 2012, 121. Also see A.-M. Slaughter, *A New World Order*, Princeton, Princeton University Press, 2004, 178.

³⁸³ H. Hillgenberg, “A Fresh Look at Soft Law”, *European Journal of International Law*, Vol. 10, No. 3, 1999, 502.

exception, or they will breach and fight it out in dispute settlement proceedings.’³⁸⁴ HILLGENBERG confirmed that the danger of elusive results is equally strong in case of treaties and non-treaty agreements.³⁸⁵ According to MARSDEN, formal treaty-making rarely overcomes the dominance of national interests.³⁸⁶ Rules do not just operate through material incentives, but also via the modification of understandings, behavioural standards and identities. Compliance may be motivated by many reasons, regardless of the legal status of the rules (e.g. reciprocity, reputation, damage to valuable state institutions, or normative and material considerations). The fear for reputational damage after non-compliance may have an equally large effect as the threat of international law enforcement mechanisms.³⁸⁷

2.4.4.4 Avoiding or breaking through deadlock

KLABBERS considered that soft law undermines the *raison d'être* (in his point of view) of law, namely simplifying the complexities of reality in order to organize life in a way man can handle. He stated that by introducing soft law, everyday complexity has been substituted by legal complexity.³⁸⁸ While it is certainly true that soft law adds to the complexity of the legal system, it also offers a solution for the cases in which hard law cannot form the answer. Indeed, soft law is often employed when a hard law agreement is not feasible. Agreements that would not be possible under a binding regime, are sometimes accepted under a soft law system.³⁸⁹ In negotiations for a legally binding agreement, the result is sometimes that after a process of so-called ‘issue subtraction’, only the non-controversial, but often empty topics remain included in the agreement, severely limiting the latter’s relevance and impact. Scaling down the impact of the provisions, instead of leaving them out of the negotiations, can then be a useful alternative.³⁹⁰ Soft law “allows states to capture the ‘easy’ gains they can recognize with incomplete knowledge, without allowing differences or uncertainties about the situation to impede completion of the bargain.”³⁹¹ Soft law agreements can therefore have a strong symbolic value, signalling the willingness of the parties to make efforts in a certain field, without having to fully commit from the start. On the other hand, soft obligations may easily be discarded if changes in the political climate or administration of a jurisdiction occur. Continuity is not ensured. This is an important drawback to take into account.

In the field of competition law for instance, while states all recognize the need for enhanced international antitrust cooperation, they do not agree on the precise content of such cooperation. And while states also see the benefits of competitive markets and antitrust laws, they have differing

³⁸⁴ P. Marsden, “‘Jaw-jaw’ not ‘law-law’ – from treaties to meetings: the increasing informality and effectiveness of international cooperation” in A. Ezrachi (ed.), *Research Handbook on International Competition*, Cheltenham, Edward Elgar Publishing, 2012, 119.

³⁸⁵ H. Hillgenberg, “A Fresh Look at Soft Law”, *European Journal of International Law*, Vol. 10, No. 3, 1999, 501.

³⁸⁶ P. Marsden, “‘Jaw-jaw’ not ‘law-law’ – from treaties to meetings: the increasing informality and effectiveness of international cooperation” in A. Ezrachi (ed.), *Research Handbook on International Competition*, Cheltenham, Edward Elgar Publishing, 2012, 116.

³⁸⁷ K. Abbott, R. Keohane, A. Moravcsik, A.-M. Slaughter & D. Snidal, “The Concept of Legalization”, *International Organization*, Vol. 54, No. 3, 2000, 419, 425. It must be noted, however, that also in the case of breach of hard law, reputational costs will occur. A binding agreement therefore still offers more compliance guarantees.

³⁸⁸ J. Klabbers, “The undesirability of soft law”, *Nordic Journal of International Law*, Vol. 67, 1998, 387.

³⁸⁹ K. Abbott & D. Snidal, “Hard and Soft Law in International Governance”, *International Organization*, Vol. 54, No. 3, 2000, 444.

³⁹⁰ A. Schäfer, “Resolving Deadlock: Why International Organisations Introduce Soft Law”, *European Law Journal*, Vol. 12, No. 2, March 2006, 208.

³⁹¹ K. Abbott & D. Snidal, “Hard and Soft Law in International Governance”, *International Organization*, Vol. 54, No. 3, 2000, 444-445.

views on the goals and priorities of such laws. The necessity to coordinate antitrust enforcement across jurisdictions is recognised, but the specifics remain an issue of debate (see above, Part I, 2).³⁹² A ‘soft’ agreement can therefore be seen as an intermediate step between ‘no agreement’ and ‘binding agreement’. In this way, “*in the face of protracted international negotiations over difficult and complex issues*”, rapid consensus building is promoted, and political momentum may be sustained.³⁹³ Soft law can be of help in those situations where “*some agreement [...] is better than no agreement at all [...] And on this line of thought, [...] any form of cooperation is better than no form of cooperation at all[...]*.”³⁹⁴ Sometimes the quality of the cooperation can even be higher than if hard law would be involved. MARSDEN for instance claimed that the ICN aims to develop best practices and tries to find a ‘highest common denominator’ instead of the lowest, as the aim is not agreement at all cost.³⁹⁵

2.4.5 Drawbacks of soft law

2.4.5.1 May disrupt institutional balance in the EU

The European Parliament issued a Resolution in 2007 on the institutional and legal implications of the use of soft law instruments in the EU legal order.³⁹⁶ While the resolution targeted the use of soft law in an ‘intra-EU’ context, some of its claims are valid in an international context as well. Because soft law instruments are often concluded in an informal manner, avoiding complex legislative procedures, the European Parliament warned that “[...] *it is only by means of the adoption of legislation through the institutional procedures laid down in the Treaty that legal certainty, the rule of law, justiciability and enforceability may be secured [...]*.”³⁹⁷ It continued that soft law instruments disrespect the institutional balance enshrined in the Treaty that allows for openness of decision-making. The European Parliament recalled that soft law was historically used to alleviate a lack of formal law-making capacity and/or means of enforcement, and went even further to state that in general, where the EU has competence to legislate, this precludes the use of ‘soft law’.³⁹⁸ The Parliament expressed its concern that soft law instruments should not be used “*as a surrogate for legislation where the Community has legislative power and where [...] this would also constitute a breach of the principle of conferred specific powers [...]*”³⁹⁹ Another consequence is that sometimes the legal basis upon which the act is based is unclear or questionable.⁴⁰⁰ Case C-660/13 Council of the European Union v European Commission demonstrated that this fear for institutional imbalance is still very much alive (see below, Part II, 4.1.4).

³⁹² A. Bradford, “International Antitrust Cooperation and the Preference for Nonbinding Regimes” in A. Guzman (ed.), *Cooperation, Comity, and Competition*, New York, Oxford University Press, 2011, 321-325.

³⁹³ Own emphasis. M. Taylor, *International competition law: a new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 362.

³⁹⁴ J. Klabbers, “The undesirability of soft law”, *Nordic Journal of International Law*, Vol. 67, 1998, 383. Also see H. Hillgenberg, “A Fresh Look at Soft Law”, *European Journal of International Law*, Vol. 10, No. 3, 1999, 501.

³⁹⁵ P. Marsden, “‘Jaw-jaw’ not ‘law-law’ – from treaties to meetings: the increasing informality and effectiveness of international cooperation”, in A. Ezrachi (ed.), *Research Handbook on International Competition*, Cheltenham, Edward Elgar Publishing, 2012, 133.

³⁹⁶ European Parliament Resolution on Institutional and Legal Implications of the Use of ‘Soft Law’ Instruments, 2007/2028(INI), 4 September 2007.

³⁹⁷ Ibid., consideration J.

³⁹⁸ Ibid., consideration J & K.

³⁹⁹ Ibid., consideration L.

⁴⁰⁰ H. Grosse Ruse-Khan, T. Jaeger & R. Kordic, “The role of atypical acts in EU external trade and intellectual property policy”, *The European Journal of International Law*, Vol. 21, No. 4, 2011, 909.

2.4.5.2 Democratic deficit and limited transparency

Linked to the previous point, soft law mechanisms are often criticised because they can be used to bypass the democratic process, by avoiding the procedures that are involved when passing hard legislation.⁴⁰¹ The procedural flexibility allowed when adopting more informal soft law instruments can significantly decrease the number of institutional players involved in decision-making, while at the same time offering less opportunities for other interested parties to express their opinion. The rise of soft law is also a trend in domestic competition law.⁴⁰² In the aforementioned European Parliament Resolution, it is stated that the use of soft law may disrupt the division of competences in the EU and flout the principles of democracy, rule of law, subsidiarity and proportionality.⁴⁰³ The Parliament went quite far by accusing soft law of creating “*a public perception of a ‘superbureaucracy’ without democratic legitimacy, not just remote from citizens but actually hostile to them, and willing to reach accommodations with powerful lobbies in which the negotiations are neither transparent nor comprehensible to citizens, [...] this may raise legitimate expectations on the part of third parties affected (e.g. consumers) who then have no way of defending them at law in the face of acts having adverse legal effects for them.*”⁴⁰⁴ Soft law is indeed accused of being instrumental to the privatisation or setting aside of legally binding standards,⁴⁰⁵ and therefore is regarded with a certain suspicion. Others have an even more extreme opinion, stating that ‘informal law’ can be regarded “*as a ploy by the powers that be to strengthen their own position, to the detriment of others*” and is but a ‘vehicle for administrative power’.⁴⁰⁶ It is said that it lays power in the hands of unelected technocrats rather than elected officials.⁴⁰⁷

Others, however, claim that having experienced experts such as competition officials ‘talk among themselves’ is better, because it creates credibility, expertise and objectivity, and is likely to be more effective.⁴⁰⁸ This is linked to the larger debate on democracy versus technocracy. Because the official procedures for the adoption of formal hard law do not need to be followed, transparency on how a soft law instrument came into existence can be lacking. Informal soft law instruments are moreover not subjected to the publication-obligation in Article 297 TFEU, again reducing transparency.⁴⁰⁹

2.4.5.3 Pick and choose leading to uncertainty

⁴⁰¹ M. Gal, “Review Essay: New Perspectives on International Antitrust”, *The American Journal of International Law*, Vol. 106, 2012, 407.

⁴⁰² See for instance Judgment of the Court of 19 July 2016, Tadej Kotnik and Others v Državni zbor Republike Slovenije, C-526/14, EU:C:2016:570 (on the Banking Communication).

⁴⁰³ European Parliament Resolution on Institutional and Legal Implications of the Use of ‘Soft Law’ Instruments, 2007/2028(INI), 4 September 2007, consideration X.

⁴⁰⁴ Ibid., consideration Y.

⁴⁰⁵ A. Gatto, *Multinational Enterprises and Human Rights – Obligations under EU Law and International Law*, Cheltenham, Edward Elgar Publishing, 2011, 76.

⁴⁰⁶ J. Klabbers, “The undesirability of soft law”, *Nordic Journal of International Law*, Vol. 67, 1998, 387.

⁴⁰⁷ A.-M. Slaughter & T. Hale, “Transgovernmental Networks and Multilevel Governance” in D. Hand & T. Hale (eds), *Handbook of Transnational Governance*, Cambridge, Polity Press, 2011, note 54, as cited in P. Marsden, “‘Jaw-Jaw’ Not ‘Law-Law’ – From ‘Treaties to Meetings: the Increasing Informality and Effectiveness of International Cooperation’” in A. Ezrachi (ed.), *Research Handbook on International Competition Law*, Cheltenham, Edward Elgar Publishing, 2012, 126. On the legitimacy of ‘network governance’, see below, Part III, 2.3.

⁴⁰⁸ P. Marsden, “‘Jaw-Jaw’ Not ‘Law-Law’ – From Treaties to Meetings: the Increasing Informality and Effectiveness of International Cooperation” in A. Ezrachi (ed.), *Research Handbook on International Competition Law*, Cheltenham, Edward Elgar Publishing, 2012, 127.

⁴⁰⁹ H. Grosse Ruse-Khan, T. Jaeger & R. Kordic, “The role of atypical acts in EU external trade and intellectual property policy”, *The European Journal of International Law*, Vol. 21, No. 4, 2011, 906.

It often appears from ICN surveys that a very large number of respondents uses or intends to use the ICN's Merger Practices and that ICN output has contributed to change in their merger review regimes.⁴¹⁰ This information does not indicate, however, whether this implies a full implementation of the practices or rather a 'pick and choose' of the most beneficial elements.⁴¹¹ While the latter is beneficial for the states involved, it is far less so for the business community, whose situation is not necessarily clarified or made more certain. Because states are not legally bound by their commitments and have great discretion in the implementation, soft law may sometimes create legal uncertainty for companies and may fail to sufficiently smoothen the legal landscape.⁴¹² Finally, without enforcement, unclear concepts in a soft law act remain unchallenged and thus opaque. This is "*aggravated by a lingering notion that non-binding instruments may at times be drafted in a less elaborate manner than hard law.*"⁴¹³ This again contributes to an environment of uncertainty.

2.4.5.4 Smokescreen

Realists dismiss and criticize soft law in international affairs as being mere 'window dressing'. Others reject soft law as a 'destabilizing factor'⁴¹⁴ or regard soft law as a 'second-best' solution or 'interim' solution, when reaching a binding agreement is not (yet) possible, and claim the value of soft law only lies in that function.⁴¹⁵

In 1998, KLABBERS, holding an extremely negative view towards soft law, called soft law a redundant and detrimental concept.⁴¹⁶ He believed that in practice, soft law "*collapses into either hard law, or no law at all.*"⁴¹⁷ He stated that "*If we anticipate that parliament may not be persuaded, then we simply devise a solution that need not be presented to parliament. If we think voters need to be comforted that some international solution does not hurt them, we tell them that as a matter of hard law, our chosen option is of limited relevance only: they need not worry, as our solution is only soft law. And if we sense that substantive agreement is still out of reach, we settle for the next best thing: the semblance of agreement. All this is perhaps most visible in international law.*"⁴¹⁸ While this statement also criticises the democratic deficit, his main problem with soft law is that it does not contribute to a real solution to pressing issues, and merely functions as a 'smokescreen'. He adds that a degree of formalism in law is necessary to avoid arbitrary power.⁴¹⁹ DAVIDOW and CHILES seem to adhere to this point of view by claiming that agreeing to soft mechanisms such as consultation procedures is in fact "*a cosmetic formula for indicating goodwill and diplomatic accessibility and disguising*

⁴¹⁰ ICN, Merger Working Group Comprehensive Assessment 2010-2011, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc767.pdf> (accessed May 2015), 4.

⁴¹¹ Also see A. Bradford, "International Antitrust Cooperation and the Preference for Nonbinding Regimes" in A. Guzman (ed.), *Cooperation, Comity, and Competition*, New York, Oxford University Press, 2011, 332.

⁴¹² M. Gal, "Review Essay: New Perspectives on International Antitrust", *The American Journal of International Law*, Vol. 106, 2012, 407.

⁴¹³ H. Grosse Ruse-Khan, T. Jaeger & R. Kordic, "The role of atypical acts in EU external trade and intellectual property policy", *The European Journal of International Law*, Vol. 21, No. 4, 2011, 910.

⁴¹⁴ K. Abbott & D. Snidal, "Hard and Soft Law in International Governance", *International Organization*, Vol. 54, No. 3, 2000, 422-423.

⁴¹⁵ P. Marsden, "Jaw-Jaw' Not 'Law-Law' – From Treaties to Meetings: the Increasing Informality and Effectiveness of International Cooperation" in A. Ezrachi (ed.), *Research Handbook on International Competition Law*, Cheltenham, Edward Elgar Publishing, 2012, 120.

⁴¹⁶ J. Klabbbers, "The undesirability of soft law", *Nordic Journal of International Law*, Vol. 67, 1998, 382-383.

⁴¹⁷ *Ibid.*, 382.

⁴¹⁸ *Ibid.*, 384.

⁴¹⁹ *Ibid.*, 391.

unwillingness to surrender national discretion or to create powerful international institutions.”⁴²⁰ TAYLOR equally claimed that soft law enables governments to be *perceived* as achieving progress.⁴²¹

This criticism is not entirely justified. While soft law is not legally binding, other incentives to comply (such as reputational damage) do exist. Nevertheless, the monitoring of compliance with soft law is often difficult and therefore creates opportunities to shirk, while the lack of firm international commitments can make it easier for domestic forces (private or government groups) to undo the agreement and change government policy.⁴²²

2.4.5.5 Domestic legal protectionism

The preference of the US for soft cooperation agreements rather than a binding multilateral agreement on competition cooperation (see below, Part I, 3), may be explained by the fact that “[c]ountries with greater power will want the international standard to move closer to their domestic laws, in order to reduce the transition costs to the new system.”⁴²³ The choice for soft law may thus be related to the relative economic and political power of a state. Powerful states would only accept hard law if it incorporated the domestic preference. Generally, weaker states benefit from harder obligations, as more powerful states can then credibly constrain themselves from opportunistic behaviour and in this way induce cooperation.⁴²⁴ A downside of hard law for weaker states is that they might not want to be perceived domestically as ‘following the dictates of a powerful state.’⁴²⁵

3. Origins of international competition cooperation

As demonstrated above, globalisation and the accompanying increase in cross-border anticompetitive behaviour shook the pillars of Westphalian sovereignty, and combined with an increase in national competition legislation, called for international cooperation. It had become increasingly difficult for states to independently tackle the anticompetitive behaviour affecting their territory, and large corporations were able to decide on the laws they were governed by. Although competition law is a young branch of law, international cooperation proved itself necessary from the very beginning.

This section analyses the factors that necessitate a continuous reconsideration of competition law at the global level, such as deficiencies in jurisdictional regimes, evolving relations between states, and changes in the structure of competition law itself.⁴²⁶ Analysis of these developments helps to better understand the current situation, and allows the identification of areas of improvement. It helps to explain where certain provisions originate, and what the rationale behind them was. As this study

⁴²⁰ J. Davidow & L. Chiles, “The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct regarding Restrictive Business Practices”, *The American Journal of International Law*, Vol. 72, No. 2, 1978, 268.

⁴²¹ M. Taylor, *International competition law: a new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 362.

⁴²² K. Abbott & D. Snidal, “Hard and Soft Law in International Governance”, *International Organization*, Vol. 54, No. 3, 2000, 446.

⁴²³ D. Sokol, “Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements”, University of Missouri-Columbia School of Law Legal Studies Research Paper No. 2007-13, 132.

⁴²⁴ It must be noted that if the level of delegation in this case would remain low, those powerful states would retain great influence over decision making.

⁴²⁵ K. Abbott & D. Snidal, “Hard and Soft Law in International Governance”, *International Organization*, Vol. 54, No. 3, 2000, 447-449.

⁴²⁶ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 6.

aims to answer the question whether there is a *future* for bilateral competition cooperation, analysis of cooperation efforts in the *past* is crucial.

3.1 External events overthrew early multilateral initiatives

3.1.1 The 1927 World Economic Conference

The history of international cooperation on competition law issues started already in 1926 in the Preparatory Committee of the World Economic Conference (WEC), established under the auspices of the League of Nations, only a few years after the appearance of the first competition laws in Europe.⁴²⁷ This occasion is generally considered the earliest recorded proposal for regulating international anti-competitive conduct and the first occasion during which global antitrust was discussed.⁴²⁸ Europe in the 1920s was characterized by US ascendancy amidst a lack of economic development and disturbed political relations following WWI. Combined with rapid re-industrialization after the war, a fertile climate was created for international cartels to thrive. It is in this unstable context that the League of Nations initiated a global conference aimed at the development of appropriate responses to the economic problems of the world, placing the protection of competition at the forefront of economic policy concern. The initiators of the conference intended to “*convince governments that cooperative arrangements were necessary to avoid economic disaster and its political repercussions.*”⁴²⁹ This made the use of law to protect global competition materialize as a prominent international issue.

The aim of the conference was not to reach a binding agreement. Participants to the conference were seen as ‘super experts’ in their field carrying great moral authority, but they did not represent their governments in official capacities. A similar rationale can now be found in the ICN, where experts (academic experts, as well as competition agency officials, not governmental agents) gather to create non-binding best practices relating to competition. A big difference, however, is that while the ICN focuses strictly on competition issues (see below, Part III, 2.1.4), the WEC focused on the reduction of (mainly governmental) barriers to international trade, such as tariffs. However, as many attributed equal importance to private barriers, for instance international cartels, the conference followed a rather integrated approach.⁴³⁰ Delegates at the conference represented (although not officially) fifty nations, and embodied many interest-groups such as industrialists, the business community, agriculturalists, financiers, government officials, economists and labour leaders. The mainly non-political nature of the WEC (in the sense that professional politicians were not negotiating the agreement) is applauded by some commentators as one of the main reasons of its ‘success’.⁴³¹

⁴²⁷ OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through ‘Positive Comity’ in Competition Law Enforcement, DAF/CLP(99)19, 14 June 1999, 7. For some historic overview, see A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010 and D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010.

⁴²⁸ M. Taylor, *International Competition Law: a New Dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 148. Also see M. Gal, “Review Essay: New Perspectives on International Antitrust”, *The American Journal of International Law*, Vol. 106, 2012, 403.

⁴²⁹ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 22-26.

⁴³⁰ *Ibid.*, 25.

⁴³¹ W. Runciman, “The World Economic Conference at Geneva”, *The Economic Journal*, Vol. 37, No. 147, September 1927, 465.

One notable participant to this conference was the US, who only held observer status as it was not a member of the League of Nations. This limited participation not only diminished the political weight of the conference, but was also the reason why the conference generated little awareness across the ocean. The US was perceived by the Europeans as a threat rather than a partner, among other reasons due to the distinctive characteristics of the US' antitrust system that was attributed little relevance for the European situation.⁴³² Characteristic of the international environment at the time as well is that some commentators emphasised the 'weakness' of the Soviet representatives, which were not member of the League either, while viewing the US input as "*an outside view of what are primarily European problems.*"⁴³³ In retrospect this 'exclusion' might have played a role in the aggressive extraterritorial behaviour of the US (see below, Part I, 3.2).

The WEC took place from May 4th to 23rd 1927 in Geneva. The plenary sessions were mainly intended to create a certain atmosphere among the participants. After these preliminaries, the negotiations took place in three main committees: commerce, agriculture, and industry. It is in the latter that the discussions on international competition policy took place. The committee was criticized as being disappointing and covering too wide a range of subjects, ranging from social justice to the future economic organisation of the League.⁴³⁴

On initiative of France, the conference was encouraged to promote cartels, which were seen as a means to rationalize economic development and industry, reduce overproduction, increase job stability, and stabilize economic relations.⁴³⁵ Indeed, originally cartels were perceived as respected economic institutions in Europe as they drove economic growth by being an engine of industrial development. It is said that "*economy by cartel was the rule in Europe prior to 1945.*"⁴³⁶ The conference took place in a context where there was little experience with competition law and all its complexities were not apparent yet.⁴³⁷ Concerns about cartels were nevertheless expressed and it was advocated that an international organisation under the League should keep the cartels in order.⁴³⁸ The conference therefore, while mostly wanting to gain support for cartels, wished to warn for abuse as well. The difficult and contentious discussions on cartels resulted in a final recommendation to "*collect information concerning international cartels, monitor their conduct, investigate the effects they produced, and publish information about harmful conduct*",⁴³⁹ as it was decided that the attitudes on the issue of international regulatory coordination to address the adverse effects of international cartels "*were too diverse to support any international regulatory regime [...]*",⁴⁴⁰ a comment that will reappear repeatedly in the future. While indeed international rules concerning cartels were considered impracticable given

⁴³² D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 27, 35.

⁴³³ W. Runciman, "The World Economic Conference at Geneva", *The Economic Journal*, Vol. 37, No. 147, September 1927, 466.

⁴³⁴ Ibid., 465, 467-468.

⁴³⁵ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 27-28.

⁴³⁶ C. Jones, "Penumbra of European Union Competition Law: External Governance, Extraterritoriality, and the Shifting Borderlands of the Internal Market" in J. Drexler, W. Grimes, C. Jones, R. Peritz, & E. Swaine (eds), *More Common Ground for International Competition Law?*, Cheltenham, Edward Elgar Publishing, 2011, 261.

⁴³⁷ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 31. Also see W. Runciman, "The World Economic Conference at Geneva", *The Economic Journal*, Vol. 37, No. 147, September 1927, 468.

⁴³⁸ The counterargument, however, was that this would constitute a trade barrier in itself as it interferes with the freedom of business. W. Runciman, "The World Economic Conference at Geneva", *The Economic Journal*, Vol. 37, No. 147, September 1927, 468.

⁴³⁹ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 27-30.

⁴⁴⁰ M. Taylor, *International Competition Law: a New Dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 149.

differences in national cartel policies, the Committee nevertheless encouraged cooperative supervision.⁴⁴¹

The Report finally produced by the WEC was labelled “*among the most important and remarkable documents which has yet appeared under the auspices of the League.*”⁴⁴² The Conference was lauded for having been able to produce unanimous and categorical recommendations on controversial issues, despite being such a large and diverse body.⁴⁴³ Even with the support from numerous governments, however, the Great Depression and later World War II and the Cold War made it basically impossible for states to adhere to the recommendations and the climate of mistrust that was generated by these events obstructed the pursuit of international agreement and coordination for decades to follow.⁴⁴⁴

3.1.2 The 1948 Havana Charter

A paradigm shift occurred during World War II and the extreme changes in the international environment, in which the idea of an ‘international community’ was abandoned. At the same time, the adverse political consequences of industrial cartelisation and the negative welfare effects of excessive concentration of economic power were recognised.⁴⁴⁵

The global competition law idea resurfaced after World War II, where a shattered Europe allowed the US to take the lead. The period of post-war economic reconstruction was seen by the US as an opportunity to advocate their plans of “*institutionalising international economic relations, liberalising world trade, and establishing an open and stable international economic system.*”⁴⁴⁶ The global competition law project was contained in the Bretton Woods program, and more specifically in the plans for an International Trade Organization (ITO), which later fell victim to the troubled relationship between the US and the former Soviet Union.⁴⁴⁷ The ITO was created by the so-called Havana Charter initiated by the US in 1945. The context in which the Havana Charter was created differed from the context of the Geneva conference in two ways: states had more experience with competition laws, and recent events had emphasised the global nature of economic issues.

The proposal for the Havana Charter, dealing with public as well as private restraints to trade, was comprised of a set of multilateral substantive principles that should serve as a code of conduct for states, and suggested the establishment of an international organisation mandated to enforce these principles. A Europe desperately craving economic recovery generally supported US proposals, regardless of whether there was true agreement on the underlying principles.⁴⁴⁸

⁴⁴¹ OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through ‘Positive Comity’ in Competition Law Enforcement, DAFNE/CLP(99)19, 14 June 1999, 7, based on OECD, Committee on Restrictive Business Practices Report on the Problems Relating to the Control of Restrictive Business Practices Affecting International Trade, E.41450, 12 January 1965, 3.

⁴⁴² W. Runciman, “The World Economic Conference at Geneva”, *The Economic Journal*, Vol. 37, No. 147, September 1927, 465.

⁴⁴³ *Ibid.*, 465.

⁴⁴⁴ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 15, 37-38.

⁴⁴⁵ M. Taylor, *International Competition Law: a New Dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 149.

⁴⁴⁶ *Ibid.*

⁴⁴⁷ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 39.

⁴⁴⁸ *Ibid.*, 44.

The Economic and Social Council of the United Nations appointed a preparatory committee to discuss and develop the proposal. The very ambitious draft charter for the ITO proposed by the US was based on the premise that anti-competitive behaviour should be considered a barrier to world trade and should be subject to strict international regulation. The draft even contained a rebuttable presumption that certain conduct was anti-competitive. The draft allowed ratifying nations as well as private parties to petition the ITO to undertake investigatory action. If the ITO identified a breach of the Charter, it would be able to direct ratifying nations to take action in order to rectify any harmful business practices.⁴⁴⁹

Many states regarded the draft as being too radical. The Charter was substantially softened and intense negotiations led to a revised charter for the ITO in 1948, which eventually became known as the 'Havana Charter'. The basic rationale of the Havana Charter remained the same in that it aimed to establish uniform minimum rules, as well as a supranational enforcement body, but this time with mere recommendatory powers. While less ambitious than the previous draft, it retained some radical elements.⁴⁵⁰

Competition law in the Havana Charter was embedded in the Restrictive Business Practices Code. As mentioned, the ultimate goal of the Charter was to revive global trade and stabilize global economic relations in the post-war era by addressing public as well as private restraints. Therefore, as was the case during the Geneva WEC, competition was embedded in a wider trade context. While the inclusion of a competition chapter received wide support, on a substantial level the final charter was indeed much less stringent than originally envisaged. There was a presumption that states should take action against certain anti-competitive actions, but there was no explicit prohibition on anti-competitive conduct.⁴⁵¹ An exhaustive list of such anti-competitive practices was included in paragraph 3 of article 46.⁴⁵² Article 50 (1) of the Charter required each member to “*take all possible measures by legislation or otherwise, in accordance with its constitution or system of law and economic organization, to ensure, within its jurisdiction, that private and public commercial enterprises do not engage in [prohibited] practices*

⁴⁴⁹ M. Taylor, *International Competition Law: a New Dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 150-151.

⁴⁵⁰ *Ibid.*, 151-153.

⁴⁵¹ Article 46 (1) specified that “[e]ach Member shall take appropriate measures and shall co-operate with the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives set forth in Article 1.” Charter for an International Trade Organization (Havana Charter), Havana, 24 March 1948, available at http://www.wto.org/english/docs_e/legal_e/havana_e.pdf (accessed April 2015).

⁴⁵² “(a) fixing prices, terms or conditions to be observed in dealing with others in the purchase, sale or lease of any product;
 (b) excluding enterprises from, or allocating or dividing, any territorial market or field of business activity, or allocating customers, or fixing sales quotas or purchase quotas;
 (c) discriminating against particular enterprises;
 (d) limiting production or fixing production quotas;
 (e) preventing by agreement the development or application of technology or invention whether patented or unpatented;
 (f) extending the use of rights under patents, trademarks or copyrights granted by any Member to matters which, according to its laws and regulations, are not within the scope of such grants, or to products or conditions of production, use or sale which are likewise not the subject of such grants;
 (g) any similar practices which the Organization may declare, by a majority of two thirds of the Members present and voting, to be restrictive business practices.”

[...] and it shall assist the Organization in preventing these practices.” This is considered as the earliest multilateral call for competition law enforcement.⁴⁵³

The enforcement possibilities as well had been weakened.⁴⁵⁴ The Charter foresaw a consultation and investigation procedure described in respectively Articles 47 and 48. The investigation procedure started with a complaint that any affected Member may file to the ITO. The organization assessed whether the complaint was justified, providing reasonable opportunity to be heard to all relevant parties. If it decided that the complaint was grounded, the members concerned would be requested to take every possible remedial action, or they will be recommended to carry out remedial measures in accordance with their respective laws and procedures.⁴⁵⁵ The ITO therefore had the authority to pressure states to take action and served to some extent as an international dispute settlement body, but it no longer had binding force.⁴⁵⁶

Fifty three of the fifty seven nations meeting in Havana ratified the Charter. Ironically, it was abandoned by the international community in 1950 primarily due to the behaviour of its main advocate. The weakened version of the Charter was perceived by the US State Department as a threat to the more stringent US competition laws, and the US Congress considered it a hazard to US economic hegemony and domestic political sovereignty, particularly in the context of its struggles with the Soviet Union, which had already rejected the Charter.⁴⁵⁷ This slow withdrawal and increasing disinterest of the US was strengthened by evolutions such as MAO TSE TUNG’S victory in China and the start of the Korean war, creating an atmosphere of disillusionment within US congress regarding international commitments.⁴⁵⁸ Moreover, the parallel negotiation by a smaller number of states of the General Agreement on Tariffs and Trade (GATT), focussing on a narrower set of related objectives, provided an easy ‘excuse’ for those opposing the ITO. They claimed that the GATT agreement would be adequate to deal with the most urgent trade issues and no new international organization was necessary, even if eventually no competition-related rules were included in the original GATT.⁴⁵⁹ In the end, then US President TRUMAN, realizing that Congress would not approve the Charter due to the internal and external political developments, withdrew the agreement from consideration in December 1950.⁴⁶⁰ As with the Geneva conference, the Havana Charter ultimately did not reach its goal mostly due to non-competition law related events.

3.1.3 The 1951 ECOSOC initiative

Another ambitious scheme putting forward a supranational system of control was developed under the Council of Europe. A European convention on the control of cartels was drafted in 1951, one

⁴⁵³ OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through ‘Positive Comity’ in Competition Law Enforcement, DAFNE/CLP(99)19, 14 June 1999, 7, based on OECD, Committee on Restrictive Business Practices Report on the Problems Relating to the Control of Restrictive Business Practices Affecting International Trade, E.41450, 12 January 1965, 6.

⁴⁵⁴ See D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 48-49.

⁴⁵⁵ Article 48(7) Charter for an International Trade Organization (Havana Charter), Havana, 24 March 1948, available at http://www.wto.org/english/docs_e/legal_e/havana_e.pdf (accessed April 2015).

⁴⁵⁶ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 51.

⁴⁵⁷ M. Taylor, *International Competition Law: a New Dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 152-153; D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 45-47.

⁴⁵⁸ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 45-47.

⁴⁵⁹ E. Elhaug & D. Geradin, *Global Competition Law and Economics*, 2nd ed., Oxford and Portland Oregon, Hart Publishing, 2011, 1240.

⁴⁶⁰ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 47-48.

year after the demise of the Havana Charter. Multijurisdictional restrictive agreements were to be registered, a commission would receive complaints from individuals or from governments, conduct hearings, negotiate settlements, and refer cases to a European-level court that could award compensation, impose fines, or delegate such tasks to Member States. Again, this original draft was considered too far-reaching and was watered-down.⁴⁶¹ The proposal was eventually overtaken by the UN. The US suggested that an intergovernmental committee be established “*to make recommendations to the Council solely for the prevention and control of restrictive business practices in international trade.*”⁴⁶² The UN therefore decided to embark on a more modest mission, by trying to formulate an international agreement on restrictive business practices, within the realm of the Economic and Social Council (ECOSOC).⁴⁶³

A draft convention was developed by an intergovernmental committee of ten countries, and was originally intended to go beyond what was developed in the framework of the Havana Charter, by adding a series of procedural and organizational articles.⁴⁶⁴ After the failure of the Havana Charter and the change of the international attitude on the matter, the draft was considered to represent minimum standards to which a large number of nations could agree. The Parliamentary Assembly furthermore underlined the benefits of a global approach.⁴⁶⁵ The Draft established an international agency that lacked any right of interference in the legislative practice of other nations, but nevertheless could engage in investigations, studies, consultations, and could issue recommendations.⁴⁶⁶ It did not hold any judicial, legislative, or other sovereign powers, the only ‘sanction’ that followed one of its reports was the one of publicity,⁴⁶⁷ and even this moderately weak sanction was already heavily objected by business circles.⁴⁶⁸ TIMBERG stated that as the draft agreement could not be formulated ‘with the precision of conveyance or contract of sale’, it should be seen as embodying general principles of action, not particularistic prescriptions, and cannot be seen as anything more than that.⁴⁶⁹

Despite being the initiator of the proposal, the US again was the one who rejected the ultimate proposal. TIMBERG, Secretary of the relevant UN Committee at the time, stated that the sole reason for the rejection was that allegedly there was a basic lack of agreement on the fundamentals, more precisely that “*this Draft Agreement would not be practicable or effective in accomplishing the elimination of*

⁴⁶¹ C. Harding & J. Joshua, *Regulating Cartels in Europe*, 2nd ed., New York, Oxford University Press, 2010, 94-95.

⁴⁶² S. Timberg, “Restrictive Business Practices as an Appropriate Subject for United Nations Action”, *Antitrust Bulletin*, Vol. 1, 1955-1956, 410. Also see M. Domke, “Notes: The United Nations Draft Convention on Restrictive Business Practices”, *International and Comparative Law Quarterly*, Vol. 4, No. 1, 1955, 129.

⁴⁶³ E. Elhauge & D. Geradin, *Global Competition Law and Economics*, 2nd ed., Oxford and Portland Oregon, Hart Publishing, 2011, 1240.

⁴⁶⁴ S. Timberg, “Restrictive Business Practices as an Appropriate Subject for United Nations Action”, *Antitrust Bulletin*, Vol. 1, 1955-1956, 411.

⁴⁶⁵ Parliamentary Assembly, Opinion No. 10 on the Report of the Ad Hoc Committee on Restrictive Business Practices of the Economic and Social Council of the United Nations, 23 September 1954.

⁴⁶⁶ M. Domke, “Notes: The United Nations Draft Convention on Restrictive Business Practices”, *International and Comparative Law Quarterly*, Vol. 4, No. 1, 1955, 135; S. Timberg, “Restrictive Business Practices as an Appropriate Subject for United Nations Action”, *Antitrust Bulletin*, Vol. 1, 1955-1956, 417.

⁴⁶⁷ S. Timberg, “Restrictive Business Practices as an Appropriate Subject for United Nations Action”, *Antitrust Bulletin*, Vol. 1, 1955-1956, 418; M. Domke, “Notes: The United Nations Draft Convention on Restrictive Business Practices”, *International and Comparative Law Quarterly*, Vol. 4, No. 1, 1955, 137.

⁴⁶⁸ M. Domke, “Notes: The United Nations Draft Convention on Restrictive Business Practices”, *International and Comparative Law Quarterly*, Vol. 4, No. 1, 1955, 138.

⁴⁶⁹ S. Timberg, “Restrictive Business Practices as an Appropriate Subject for United Nations Action”, *Antitrust Bulletin*, Vol. 1, 1955-1956, 423-424.

*restrictive business practises in international trade because the various national policies, legislation, and enforcement procedures in this fields were not sufficiently comparable.*⁴⁷⁰ While this may be so, it remains confusing why the initiative was proposed in the first place, shortly after the demise of the Havana Charter even, as surely such agreement did not exist at that time either. It seems that the political nature of antitrust rose to the surface during this process. The lack of trust in further efforts toward international cooperation by the US may find its origins here, as the US has lost some of its credibility after abandoning its own initiatives multiple times. According to TIMBERG, the value of the draft is to be found in providing the international community with general clues as to the basis for effective United Nations action in the economic area.⁴⁷¹

3.2 Extraterritoriality emerged as default solution

These consecutive disappointments to develop a multinational legal framework led to an overall abandonment of the project for decades. Moreover, in Europe, competition law was no longer at the forefront of social and economic organization. During the war the state had gained near total control in the economy and its intervention was still needed for recovery.⁴⁷² National laws therefore remained the only option to combat international anticompetitive behaviour and an alternative solution emerged in the form of extraterritorial application of national competition laws.⁴⁷³

3.2.1 Theories of extraterritoriality

At EU-level, the extraterritorial application of competition laws is not regulated (formally or informally) in the treaties. The main articles concerning competition law in the Treaty on the Functioning of the European Union (TFEU), Articles 101 and 102 TFEU⁴⁷⁴ do not mention whether they apply extraterritorially. Therefore, the Court of Justice of the EU (the Court), often confirming Commission practice, has developed their application in its case-law.⁴⁷⁵ Several systems of extraterritoriality exist.⁴⁷⁶ Three well-known legal doctrines have been put forward, two of which were explicitly confirmed by the Court.

The first doctrine, based on the nationality principle, was only confirmed by the Court in 1972 in the *Dyestuffs* case. The ‘economic entity doctrine’ implies that the activities of undertakings that have their seat in the EU fall under the jurisdiction of the Commission. The Court held parent companies from third countries liable for the anti-competitive behaviour of their EU subsidiaries over which they had control and therefore formed a ‘single economic entity’. Pivotal in this doctrine is that the

⁴⁷⁰ Ibid., 411, 429.

⁴⁷¹ Ibid., 415, 439.

⁴⁷² D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 62.

⁴⁷³ M. Gal, “Review Essay: New Perspectives on International Antitrust”, *The American Journal of International Law*, Vol. 106, 2012, 404.

⁴⁷⁴ Article 101 & 102 of the Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012.

⁴⁷⁵ D. Geradin, M. Reysen, & D. Henry, “Extraterritoriality, Comity, and Cooperation in EU Competition Law” in A. Guzman (ed.), *Cooperation, Comity, and Competition*, New York, Oxford University Press, 2011, 24.

⁴⁷⁶ For an analysis of Japanese extraterritorial enforcement for instance, see G. Trujillo, “Mutual Assistance under the International Antitrust Enforcement Assistance Act: Obstacles to a United States-Japanese Agreement”, *Texas International Law Journal*, Vol. 33, 1998, 623-624. For a detailed description of four types of conflict rules (territoriality, pseudo-territoriality, the effects principle, and the balancing approach), see J. Basedow, “Competition Policy in a Globalized Economy: from Extraterritorial Application to Harmonization” in M. Neumann & J. Weigand (eds), *The International Handbook of Competition*, Cheltenham, Edward Elgar Publishing, 2004, 323.

subsidiaries in practice do not make their business decisions independently, but under the decisive influence of the parent company.⁴⁷⁷

Evidently this theory has its limits, as it cannot be used to assume jurisdiction over purely non-European players distorting the Single Market. An alternative doctrine was therefore developed. The ‘implementation doctrine’ found its origins in the territoriality principle, and inferred jurisdiction to the EU over conduct having a sufficiently close link to its territory. The core of the doctrine is that in case anticompetitive agreements or practices are implemented within the EU and trade between member states is affected, they fall under the scope of articles 101 and 102 TFEU, irrespective of their geographic origins, or whether or not EU subsidiaries, (sub-) agents or branches were used.⁴⁷⁸ This was clarified by the Court in the *Wood Pulp* case, where it distinguished between two elements of an infringement of former Article 85 (current article 101 TFEU), namely the formation of the anticompetitive agreement, decision or concerted practice, and its implementation. The Court then pointed to the ease with which the competition provisions of the EU could be evaded if their applicability depended on the place of formation of the anticompetitive agreement, decision or concerted practice. It concluded that the place of implementation of the anticompetitive conduct should therefore be the decisive factor, regardless of where and by whom it was conceived.⁴⁷⁹ What actions constitute an ‘implementation’ was further clarified in the *Gencor* case, stating that the mere sale in the EU is an implementation act, irrespective of where the sources of supply or the production plants are located.⁴⁸⁰ ELHAUGE and GERADIN read in this doctrine that it required that affirmative steps were taken by the companies in question to market products within the EU.⁴⁸¹ Their opinion is supported by former Advocate General VAN GERVEN, who concluded that this requirement was what distinguished the implementation doctrine from the US effects doctrine.⁴⁸² The vision that a *refusal* to sell, creating a competitive restriction within the EU’s territory, can be considered as being implemented in the EU exists as well.⁴⁸³

The final doctrine is acknowledged by the Commission and various Advocate Generals, but disagreement exists on whether it is generally confirmed by the Court, which prefers to rely on the two other doctrines, as they are less politically sensitive.⁴⁸⁴ This doctrine is the effects doctrine, which is also based on the territoriality principle and extends jurisdiction to situations where the effects in

⁴⁷⁷ Judgment of 14 July 1972, *Imperial Chemical Industries Ltd. v Commission of the European Communities*, 48-69, EU:C:1972:70, paragraph 130-135 (Dyestuffs).

⁴⁷⁸ D. Geradin, M. Reysen, & D. Henry, “Extraterritoriality, Comity, and Cooperation in EU Competition Law” in A. Guzman (ed.), *Cooperation, Comity, and Competition*, New York, Oxford University Press, 2011, 25, footnote 16, 26.

⁴⁷⁹ Judgment of 27 September 1988, *A. Ahlström Osakeyhtiö and others v Commission of the European Communities*, Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, EU:C:1988:447, paragraph 16-17 (Wood Pulp). Also see M. Blauberger, “The Governance of Overlapping Jurisdictions. How International Cooperation Enhances the Autonomy of Competition Authorities”, *Transtate Working Papers*, No. 102, Bremen, 2009, 4-5.

⁴⁸⁰ Judgment of 25 March 1999, *Gencor Ltd v Commission of the European Communities*, T-102/96, EU:T:1999:65, paragraph 87 (Gencor).

⁴⁸¹ This would imply that it is uncertain whether non-European firms engaged in refusals to sell to EU territory would fall under Article 101 TFEU as they are allegedly not implementing any commercial practice within the EU. E. Elhauge & D. Geradin, *Global Competition Law and Economics*, 2nd ed., Oxford and Portland Oregon, Hart Publishing, 2011, 1175-1176.

⁴⁸² W. van Gerven, “EC jurisdiction in antitrust matters: the Wood Pulp judgment” in B. Hawk (ed.), *Fordham Corporate Law Institute*, 1989, 454, 470.

⁴⁸³ E. Elhauge & D. Geradin, *Global Competition Law and Economics*, 2nd ed., Oxford and Portland Oregon, Hart Publishing, 2011, 1175-1176.

⁴⁸⁴ D. Geradin, M. Reysen, & D. Henry, “Extraterritoriality, Comity, and Cooperation in EU Competition Law” in A. Guzman (ed.), *Cooperation, Comity, and Competition*, New York, Oxford University Press, 2011, 27-28. Also see B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 21.

the EU of foreign anticompetitive actions are immediate, reasonably foreseeable, and substantial.⁴⁸⁵ The doctrine has been endorsed by the Court of First Instance (now General Court) in the aforementioned 1999 *Gencor* case, where it stated that the Commission could apply the Merger Regulation to the merger of South African Gencor Ltd. and British Lonrho Plc. as it would have had an ‘immediate and substantial effect in the Community.’⁴⁸⁶

The EU was not at the forefront of the extraterritorial application of competition laws. While in the US extraterritoriality was still rejected in 1909,⁴⁸⁷ already in 1911-1913, decisions can be found that enlarged the reach of the US jurisdiction, further expanded by decisions in 1917 and 1927 stating that “*trivial or incidental U.S. acts by the defendant or its agents were sufficient in cases where there were substantial effects in the United States.*”⁴⁸⁸ This was later converted into a general effects test. The US has for long aggressively pursued extraterritorial application of its laws and was the first to be confronted with the limits of this strategy. US antitrust laws have broad extraterritorial reach. The Sherman Act provides that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal”, while the Foreign Trade Antitrust Improvements Act (FTAIA), covers any conduct that has a direct, substantial, and reasonably foreseeable effect on US commerce and that gives rise to a claim under section 1 of the Sherman Act.⁴⁸⁹

While the effects doctrine is now used all over the world,⁴⁹⁰ it was originally developed by a US Court of Appeal in the well-known *Alcoa* judgment of 1945, the same year the US initiated the Havana Charter. In this case, the US’ jurisdiction was confirmed, provided that the anticompetitive conduct had an intended effect on the US market.⁴⁹¹ The exact meaning of these concepts and thus the scope of the extraterritorial jurisdiction were later interpreted by many other courts and were subject to vast debate.⁴⁹² The *Timberlane* judgment refined and softened the doctrine (that until then did not whatsoever take into account foreign nations’ interests) and integrated some form of self-restriction by demanding first, that there is some (actual or intended) effect on US foreign commerce, second, that such effect is sufficiently large to form a cognizable injury to the plaintiff, and third, that the interests of the US and the links to it in asserting extraterritorial jurisdiction are ‘sufficiently strong’ compared to those of other states (a comity requirement, see below, Part II, 2.2.4).⁴⁹³ This multi-factor balancing test is known as the ‘jurisdictional rule of reason test’. This reasoning, however, was

⁴⁸⁵ Judgment of 25 March 1999, *Gencor Ltd v Commission of the European Communities*, T-102/96, EU:T:1999:65, paragraph 87, 90 (*Gencor*).

⁴⁸⁶ M. Blauberger, “The Governance of Overlapping Jurisdictions. How International Cooperation Enhances the Autonomy of Competition Authorities”, *Transtate Working Papers*, No. 102, Bremen, 2009, 4-5.

⁴⁸⁷ See *American Banana Co. v United Fruit Co.*, 213 US 347, (1909), upholding a purely territorial jurisdictional approach.

⁴⁸⁸ E. Elhauge & D. Geradin, *Global Competition Law and Economics*, 2nd ed., Oxford and Portland Oregon, Hart Publishing, 2011, 1141.

⁴⁸⁹ <http://globalinvestigationsreview.com/benchmarking/the-investigations-review-of-the-americas-2017/1067471/international-cartel-investigations-in-the-united-states> (accessed June 2017).

⁴⁹⁰ According to TERHECHTE “*The effects doctrine is the foundation for almost all competition and antitrust laws worldwide. This applies to the German ARC (§130[2]), the US Antitrust Law, the EU Law, the national laws of all EU Member States, and also to Asia (Indonesia, Singapore, South Korea and probably also Japan) as well as South Africa.*” J. Terhechte, *International Competition Enforcement Law Between Cooperation and Convergence*, Heidelberg, Springer-Verlag, 2011, 42.

⁴⁹¹ *United States v Aluminum Co. of America*, 148 F.2d 416 (2d Cir./CA2 1945).

⁴⁹² See for instance *United States v Timken Roller Bearing Co.*, 83 F. Supp. 284, 309 (ND Ohio 1949) and *United States v. Watchmakers of Switzerland Inf. Ctr.*, 168 F. Supp. 904 (S.D.N.Y. 1958).

⁴⁹³ *Timberlane Lumber Co. v Bank of America*, 549 F. 2d 597 (9th Cir. 1976).

criticised by other Courts⁴⁹⁴ and rejected entirely by the US Supreme Court in the infamous *Hartford Fire* case.⁴⁹⁵ In this case the Supreme Court limited the use of comity, in other words the balancing of the US's interests with those of other states, to cases of 'true conflict', i.e. cases in which an actor falling under the rules applicable in multiple jurisdictions cannot comply with one jurisdiction's rules without violating the other's. The Supreme Court, by narrow majority, thereby endorsed the effects test but rejected the rule-of-reason limitation.⁴⁹⁶ This approach obviously resulted in a very aggressive US pursuit of extraterritorial jurisdiction.⁴⁹⁷

Some moderation was offered by the *Empagran* case, in which the US Supreme Court restricted the reach of US extraterritoriality to a certain extent.⁴⁹⁸ This moderation was in no small part the consequence of the intervention of numerous foreign governments including the United Kingdom, Republic of Ireland, Federal Republic of Germany, Belgium, Canada, Japan and the Netherlands, all making the point to greater or lesser extent that considerations of comity should lead the US to defer to foreign remedies.⁴⁹⁹ The Supreme Court in this case gave considerable weight to issues of international comity and enforcement cooperation.⁵⁰⁰ In the judgment, based on the US FTAIA, "*the Court unanimously held that where anticompetitive behavior, such as a price-fixing agreement, 'significantly and adversely affects both customers outside the United States and customers within the United States, but the adverse foreign effect is independent of any adverse domestic effect,' plaintiffs who allege that they have been injured by the 'foreign effect' cannot invoke the jurisdiction of U.S. antitrust laws or courts.*"⁵⁰¹ In other words, injuries that are independent of any adverse domestic effect cannot give rise to a damages claim under the Sherman Act for foreign purchasers. This interpretation of comity by the US Supreme Court can be contrasted to a certain extent to its subsequent ruling in *Intel v. Advanced Micro Devices*, which will be discussed in Part II (see below, Part II, 2.2.4.3).⁵⁰²

3.2.2 Limits of extraterritoriality

Extraterritorial enforcement only benefits those jurisdictions that have the economic or political leverage to do so.⁵⁰³ Small or developing jurisdictions often lack the credibility and resources to apply

⁴⁹⁴ See for instance the 1981 *National Bank of Canada* Case (National Bank of Canada v Interbank Card Association and Bank of Montreal, 666 F.2d 6 (2d Cir. 1981)) and the *Laker Airways* case of 1984 (Laker Airways Ltd. v Sabena Belgian World Airlines, 235 U.S. App. D.C. 207, 731 F.2d 909 (D.C. Cir. 1984)).

⁴⁹⁵ *Hartford Fire Insurance Co. v California*, 509 US 764, (1993).

⁴⁹⁶ P. Stephan, "Global Governance, Antitrust, and the Limits of Cooperation", *Cornell International Law Journal*, Vol. 38, 2005, 204.

⁴⁹⁷ B. Peck, "Extraterritorial Application of Antitrust Laws and the U.S.-EU Dispute over the Boeing and McDonnell Douglas Merger: From Comity to Conflict? An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution", *San Diego Law Review*, Vol. 35, 1998, 1184.

⁴⁹⁸ *F. Hoffmann-La Roche Ltd. v Empagran S.A.*, 124 S.Ct. 2359 (2004).

⁴⁹⁹ A. Klevorick & A. Sykes, "United States Courts and the Optimal Deterrence of International Cartels: a Welfarist Perspective on Empagran" in E. Fox & D. Crane (eds), *Antitrust stories*, New York, Foundation Press, 2007, 388.

⁵⁰⁰ C. Goldman, C. Hersh, & C. Witterick, "International Antitrust: Developments after Empagran and Intel – Comity Considerations", American Bar Association Spring Meeting, 31 March 2005, 10.

⁵⁰¹ United States Council for International Business, "Summary of U.S. Supreme Court Decision in Empagran Case", available at <http://www.uscib.org/index.asp?documentID=2941> (accessed November 2014). Also see A. Klevorick & A. Sykes, "United States Courts and the Optimal Deterrence of International Cartels: a Welfarist Perspective on Empagran" in E. Fox & D. Crane (eds), *Antitrust stories*, New York, Foundation Press, 2007, 361- 393.

⁵⁰² *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

⁵⁰³ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 4.

their laws against large international firms.⁵⁰⁴ Apart from the fact that this way of ‘regulating’ international competition is a developed country luxury due to the fact that it requires the mobilization of substantial resources, other objections exist as well.⁵⁰⁵

3.2.2.1 Uncertainty

Central in the extraterritorial application of national competition laws is that it is a unilateral process, in which decisions are based primarily on the state’s own interest. To what extent, if at all, foreign interests are considered, is at the discretion of the state. The exact scope of a jurisdiction’s extraterritorial reach, or rather the relevant weight attributed to international comity considerations and the circumstances in which they apply, are hard to determine and cause much legal uncertainty. This is illustrated by the conflicts on this matter between policy-makers and some of the US judiciary, among the US’ circuits, and even inside the Supreme Court itself (see below, Part II, 2.2.4).⁵⁰⁶

As demonstrated by DLOUHY, there are countless qualifications of the scope of the effects doctrine, such as whether anticompetitive behaviour should or should not be intended, and whether it should have “‘some effect’, ‘any effect’, an ‘appreciable effect’, a ‘substantial effect’, a ‘direct and substantial effect’ or a ‘direct and influencing effect’.”⁵⁰⁷ Right after the introduction of the effects doctrine in the *Alcoa* case, some courts concluded that anticompetitive behaviour fell under US jurisdiction as soon as there was any kind of effect in the US, however, most courts as well as the Second Restatement of Foreign Relations required a direct, substantial, and foreseeable effect. This was later codified in the Foreign Trade Antitrust Improvements Act of 1982.⁵⁰⁸ An example of the opacity surrounding the effects doctrine can be found in the *Motorola Mobility LLC v. AU Optronics et al.* and *Hsiung and AU Optronics Corp. America Inc. v. United States* cases, wherein the Supreme Court refused to resolve a circuit split on the applicability of the FTAIA, more precisely regarding the scope of the FTAIA’s requirement that anticompetitive conduct must have a direct, substantial, and reasonably foreseeable effect on US commerce to fall within the reach of the Sherman Act. Both cases dealt with protracted criminal and civil litigation relating to an alleged worldwide scheme to fix prices in liquid crystal display panels. They concerned the same products, the same conspiracy, and the same FTAIA provisions (in particular 15 USC § 6a, limiting the extraterritorial application of US antitrust law), but the circuit courts nevertheless arrived at opposite conclusions.⁵⁰⁹ In the *Motorola Mobility* case,⁵¹⁰ Judge Posner

⁵⁰⁴ M. Gal, “International Antitrust Solutions: Discrete Steps or Causally Linked?” in J. Drexler, W. Grimes, C. Jones, R. Peritz, & E. Swaine (eds), *More Common Ground for International Competition Law?*, Cheltenham, Edward Elgar Publishing, 2011, 245.

⁵⁰⁵ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford University Press, Oxford, 2016, 181.

⁵⁰⁶ W. Connolly, “Lessons to be Learned: the Conflict in International Antitrust Law Contrasted with Progress in International Financial Law”, *Fordham Journal of Corporate and Financial Law*, Vol. 6, No. 1, 2000, 218; C. Goldman, C. Hersh, & C. Witterick, “International Antitrust: Developments after Empagran and Intel – Comity Considerations”, American Bar Association Spring Meeting, 31 March 2005, 2.

⁵⁰⁷ A. Dlouhy, *Extraterritoriale Anwendung des Kartellrechts im europäischen und USamerikanischen Recht*, Baden-Baden, Nomos, 2003, 69-73, as cited in M. Blauberger, “The Governance of Overlapping Jurisdictions. How International Cooperation Enhances the Autonomy of Competition Authorities”, *Transtate Working Papers*, No. 102, Bremen, 2009, 15.

⁵⁰⁸ E. Elhauge & D. Geradin, *Global Competition Law and Economics*, 2nd ed., Oxford and Portland Oregon, Hart Publishing, 2011, 1143. See The Code of Laws of the United States of America, Title 15 (15 USC §§ 6a, 45 (a)(3)).

⁵⁰⁹ J.T. Kirklin & D.A. McEvoy, “Supreme Court surprises the antitrust world with denial of cert in *Motorola* and *AU Optronics*”, *Lexology*, 15 June 2015. However, also see R. Connolly, “My Two Cents on the *Motorola Mobility/AU Optronics* Cert Petitions”, *CartelCapers Blog*, 9 April 2015.

⁵¹⁰ *Motorola Mobility LLC v. AU Optronics Corp.*, F.3d 14-8003, 2014 WL 1243797 (7th Cir. 2014). This decision was later vacated.

from the US Court of Appeals for the Seventh Circuit held that the FTAIA bars suits alleging the price fixing of component parts (LCD displays) sold and integrated abroad into final products (mobile phones) eventually imported to and sold within the US because such price fixing failed the FTAIA's direct effects test as well as the requirement that the effect of the defendant's practice must give rise to an antitrust claim in the US.⁵¹¹ In other words, it was established that "*the extraterritorial reach of U.S. antitrust law does not extend to claims based on the anticompetitive conduct of foreign actors in non-U.S. sales of component parts, even if the defendant(s) know those components will be integrated into products eventually sold in the United States, and even if a U.S. entity determined the components' purchase price on behalf of its foreign subsidiary.*"⁵¹² In the *AU Optronics* case,⁵¹³ the Ninth Circuit acknowledged that if the government proceeds under the FTAIA using a 'domestic effects' theory, it must prove that the defendants' conduct had a direct, substantial, and reasonably foreseeable effect on US commerce, but declined to assess whether the government satisfied this standard (which according to many was the most significant issue) because it found that substantial evidence supported a conviction under the 'import trade/commerce' theory.⁵¹⁴ Earlier, in a different context the Seventh and Ninth Circuits had already clashed when employing different standards to determine whether an effect of foreign anticompetitive conduct was 'direct' under the FTAIA. In *LSL Biotechnologies*,⁵¹⁵ the Ninth Circuit rather strictly stated that an effect is 'direct' if it follows as an immediate consequence of the defendant's activity, without deviation or interruption. The Seventh Circuit's *Minn-Chem* opinion, however, considered that an effect is direct if it bore a 'reasonably proximate causal nexus' with the foreign anticompetitive conduct.⁵¹⁶

3.2.2.2 Inadequacy

Sticking to a strict territorial approach clearly does not suffice to protect a state's market from global anticompetitive behaviour.⁵¹⁷ While noticeably widening the scope of jurisdiction, unilateral extraterritorial application of the law comes with significant drawbacks as well. It subjects international cartels or other anticompetitive behaviour to different national laws, which may result in irreconcilable outcomes or burdensome procedures. Indeed, regulations vary across jurisdictions, and firms engaging in multinational business are confronted with several sets of legal rules that must be followed, resulting in a de facto regime that is likely more restrictive than any individual state would choose for itself. As mentioned (see above, Part I, 1.2), under-regulation may occur as well when countries simultaneously and selectively do not apply their laws outside their borders, for instance with regard to export cartels.⁵¹⁸

3.2.2.3 Resistance

⁵¹¹ S. Meisner, "FTAIA and Foreign Sales: Seventh Circuit Limits Extraterritorial Reach of U.S. Antitrust Law in *Motorola Mobility v. AU Optronics*", *McDermott, Will & Emery*, 8 April 2014.

⁵¹² *Ibid.*

⁵¹³ See <https://www.pbwt.com/content/uploads/2016/09/12-104922.pdf> (accessed August 2017).

⁵¹⁴ Ginsberg, Melissa R., "Expert Testimony: Additional Insights from *AU Optronics*", Antitrust Update Blog Patterson Belknap, 4 August 2014, <https://www.antitrustupdateblog.com/expert-testimony-additional-insights-au-optronics>.

⁵¹⁵ *United States v LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004) (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992)).

⁵¹⁶ *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012).

⁵¹⁷ One example is that producers could easily exploit such a system by moving to states with producer-friendly regimes. P. Stephan, "Global Governance, Antitrust, and the Limits of Cooperation", *Cornell International Law Journal*, Vol. 38, 2005, 209.

⁵¹⁸ See A. Guzman, "International competition law" in A. Guzman and A. Sykes (eds), *Research handbook in international economic law*, Cheltenham, Edward Elgar Publishing, 2007, 433-437.

Diplomatic problems can arise, as states will often find themselves harmed in their sovereignty by the extraterritorial application of foreign laws.⁵¹⁹ States feared in particular the wide discovery powers available for private parties and courts in the US and the possibility of treble-damages being imposed on non-US defendants.⁵²⁰ Moreover, in order for extraterritorial enforcement to be effective, very often the assistance of other states will still be needed, for instance during the proceedings, in gathering evidence or during the enforcement.⁵²¹ STEPHAN elaborated on the fact that actually there is “no categorical reason to believe that the benefits from desirable competition rules permitted by the effects test necessarily will be greater than the costs generated by inefficient regulation.”⁵²² Indeed, the rule of reason test in the effects doctrine entails a high degree of instability and unpredictability, while it does not eliminate the costs of under- or overregulation.⁵²³

Nevertheless, the *Zeitgeist* was right for the US to apply its laws extraterritorially: many European states were still preoccupied with their economic and political reconstruction, and most states did not have sufficiently advanced competition laws to (threaten to) reciprocate. While generally the rejection of a newly asserted principle by a large number of states results in its preclusion from being considered a valid legal principle under international law, a perhaps deceptive, but significant delay in responses caused by the particular post-war circumstances prevented this.⁵²⁴ According to WAGNER-VONN PAPP the sheer number of jurisdictions adhering to the effects doctrine “makes it a fruitless endeavor to argue that it is incompatible with public international law.”⁵²⁵

Some resistance emerged nonetheless, most noticeably in the form of blocking- and claw-back statutes. Blocking statutes are intended to restrain extraterritorial claims by making discovery more difficult.⁵²⁶ Indeed, unilateral extraterritorial enforcement of domestic laws is not only limited by public international law (via the ban on intervention as well as the ban on abuse of law and the related principle of comity) but also by national laws.⁵²⁷ Through this type of statutes, states hoped that by forbidding their national firms to provide documents to foreign competition authorities or courts (by prohibiting to comply with court orders, or investigative requests)⁵²⁸, those courts would

⁵¹⁹ A. Jones & B. Sufrin, *EC Competition Law: Text, Cases and Materials*, 3rd ed., New York, Oxford University Press, 2008, 1357.

⁵²⁰ H. First, “The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law”, *Antitrust Law Journal*, Vol. 68, No. 3, 2001, 723-724.

⁵²¹ J. Basedow, “Competition Policy in a Globalized Economy: from Extraterritorial Application to Harmonization” in M. Neumann & J. Weigand (eds), *The International Handbook of Competition*, Cheltenham, Edward Elgar Publishing, 2004, 324-325.

⁵²² P. Stephan, “Global Governance, Antitrust, and the Limits of Cooperation”, *Cornell International Law Journal*, Vol. 38, 2005, 208.

⁵²³ *Ibid.*, 209.

⁵²⁴ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 67. The same spirit caused the initial enthusiasm for US proposals for the Havana Charter.

⁵²⁵ F. Wagner-von Papp, “Should Google’s Secret Sauce be Organic?”, *Melbourne Journal of International Law*, Vol. 16, 2015, 616-617.

⁵²⁶ E. Swaine, “Cooperation, Comity, and Competition Policy: United States” in A. Guzman (ed.), *Cooperation, Comity, and Competition*, New York, Oxford University Press, 2011, 10. For more information on blocking statutes, see B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 49-52.

⁵²⁷ J. Terhechte, *International Competition Enforcement Law Between Cooperation and Convergence*, Heidelberg, Springer-Verlag, 2011, 43.

⁵²⁸ W. Connolly, “Lessons to be Learned: the Conflict in International Antitrust Law Contrasted with Progress in International Financial Law”, *Fordham Journal of Corporate and Financial Law*, Vol. 6, No. 1, 2000, 214-215.

renounce to enforce their order.⁵²⁹ Blocking statutes therefore refer to laws that prohibit cooperation with foreign authorities (for instance by supplying evidence) or laws that prohibit local firms from complying with certain foreign awards.⁵³⁰ Similarly, when the US enacted its International Antitrust Enforcement Assistance Act (IAEAA) (see below, Part II, 3.2.1.3), allowing the exchange of confidential information between competition authorities, opposition rose in the form of blocking statutes compelling domestic parties to resist “*both discovery production orders issued by U.S. authorities (discovery blocking statutes) and U.S. court judgments rendered in antitrust cases against a foreign party (judgment blocking statutes)*.”⁵³¹ Foreign defendants in antitrust cases can moreover introduce special international defences, such as ‘foreign sovereign compulsion’, as the Chinese defendants in the *Vitamins* cartel case attempted to do in the US courts.⁵³² Use of this defence obstructs liability in front of a foreign court.⁵³³ The doctrine is based on the reasoning that “*if a foreign defendant has no choice but to comply with a foreign sovereign's directive, and if this choice results in a violation of U.S. laws, fairness considerations for the defendant and recognition of the foreign government's interests may outweigh the interests served by holding the foreign defendant liable in a U.S. court.*”⁵³⁴ A final type of defensive measure are claw-back statutes, that enable firms to ‘claw-back’ the damages they had to pay pursuant to foreign decisions.⁵³⁵ It was a reaction to the possibility of the imposition of treble damages under US antitrust laws, and allows the reduction of such damages.⁵³⁶ Such laws were very common by the end of the 1980s, varying in severity and scope.⁵³⁷

3.3 Multilateral efforts continue to fail

The context for international cooperation drastically changed during the 1990s, putting pressure on the then existing system. New economic and political relations as well as technological progress recreated global markets and changed the size, importance, and interdependence of markets. The collapse and market turn of the Soviet Union in 1991 put global competition on the agenda again, as the shortcomings of extraterritorial enforcement became more and more apparent.⁵³⁸

3.3.1 Munich Group Draft International Antitrust Code

⁵²⁹ B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 51.

⁵³⁰ B. Sweeney, "International Competition Law and Policy: A Work in Progress", *Melbourne Journal of International Law*, Vol. 10, 2009, 59. For instance, in a competition procedure against American oil companies, business papers and other documents of the British business partners were requested under subpoena. The British Government, however, prohibited the submission of such documentation, as did the Dutch, French, Indian and Pakistan Governments when faced with a similar request. M. Domke, "Notes: The United Nations Draft Convention on Restrictive Business Practices", *International and Comparative Law Quarterly*, Vol. 4, No. 1, 1955, 136-137.

⁵³¹ G. Trujillo, "Mutual Assistance under the International Antitrust Enforcement Assistance Act: Obstacles to a United States-Japanese Agreement", *Texas International Law Journal*, Vol. 33, 1998, 616.

⁵³² M. Chowdhury, "From Paper Promises to Concrete Commitments: Dismantling the Obstacles to Transatlantic Cooperation in Cartel Enforcement", American Antitrust Institute Working Paper No. 11-09, 28 November 2011, 2.

⁵³³ J. Lee, "Vitamin 'C' is for Compulsion: Delimiting the Foreign Sovereign Compulsion Defense", *Virginia Journal of International Law*, Vol. 50, No. 3, 2010.

⁵³⁴ Ibid.

⁵³⁵ B. Sweeney, "International Competition Law and Policy: A Work in Progress", *Melbourne Journal of International Law*, Vol. 10, 2009, 59.

⁵³⁶ W. Connolly, "Lessons to be Learned: the Conflict in International Antitrust Law Contrasted with Progress in International Financial Law", *Fordham Journal of Corporate and Financial Law*, Vol. 6, No. 1, 2000, 214-215.

⁵³⁷ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 68.

⁵³⁸ Ibid., 75-78.

In the early nineties a private initiative, led by Professor Wolfgang FIKENTSCHER refocused attention to the value of an international antitrust law. Meeting in Munich, an International Antitrust Code Working Group of (mainly European - German, but also some US and Japanese) competition law scholars developed the Draft International Antitrust Code (DIAC) or 'Munich code'.⁵³⁹ The authors found inspiration in the examples of the Paris Convention of 1883, the Berne Convention of 1886, and other intellectual property (IP) protection treaties, as these international instruments used national laws for international purposes and because IP law was considered comparable to the field of competition law. The sanction mechanism of the GATT also served as an inspiration.⁵⁴⁰ The code was meant to establish a basis for international debate and perhaps an international agreement.⁵⁴¹ However, the goal was not just to elaborate some vague principles, and political constraints or feasibility arguments were not taken into account. What further distinguished the DIAC from earlier multilateral initiatives was that it did not intend to create a uniform global competition law, but reserved a prominent place for national antitrust laws.⁵⁴²

The DIAC was intended to be incorporated into the GATT as a plurilateral trade agreement. It was intended to provide practical rules for international trade and commerce, rather than a theoretical model of competition.⁵⁴³ It was meant to be enforced via national institutions in domestic jurisdictions. Nations adhering to the code were required to incorporate certain minimum standards described in the code into their domestic law. The scope of the code was similar to the scope of the Havana charter, covering horizontal restraints, vertical restraints, mergers and concentrations and abuses of dominant position.⁵⁴⁴ It consisted of a substantive as well as procedural hatch. The DIAC intended to provide certain substantive minimum standards to be incorporated in national law, as well as to allow for international procedural initiatives, for both an international body and the parties to the agreement, which were limited to cross-border situations to ensure the effectiveness of international antitrust law.⁵⁴⁵ According to GERBER, the most prominent substantive provision in the code was a prohibition of so-called 'consensus wrongs'. These were certain 'hard-core' anti-competitive practices that should be condemned by all states adhering to the code, in particular a general ban on cartels as well as abuse of market power. Also pre-merger notification rules were foreseen.⁵⁴⁶ Article 17 of the DIAC obliged all member states to establish independent competition

⁵³⁹ B. Peck, "Extraterritorial Application of Antitrust Laws and the U.S.-EU Dispute over the Boeing and McDonnell Douglas Merger: From Comity to Conflict? An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution", *San Diego Law Review*, Vol. 35, 1998, 1204.

⁵⁴⁰ W. Fikentscher, "The Draft International Antitrust Code ('DIAC') in the Context of International Technological Integration", *Chicago-Kent Law Review*, Vol. 72, No. 2, 1996-1997, 537.

⁵⁴¹ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 101-102.

⁵⁴² W. Fikentscher, "The Draft International Antitrust Code ('DIAC') in the Context of International Technological Integration", *Chicago-Kent Law Review*, Vol. 72, No. 2, 1996-1997, 534-536.

⁵⁴³ B. Peck, "Extraterritorial Application of Antitrust Laws and the U.S.-EU Dispute over the Boeing and McDonnell Douglas Merger: From Comity to Conflict? An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution", *San Diego Law Review*, Vol. 35, 1998, 1204.

⁵⁴⁴ D. Gifford, "The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry", *Minnesota Journal of Global Trade*, Vol. 6, No. 2, 1997, 5.

⁵⁴⁵ B. Peck, "Extraterritorial Application of Antitrust Laws and the U.S.-EU Dispute over the Boeing and McDonnell Douglas Merger: From Comity to Conflict? An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution", *San Diego Law Review*, Vol. 35, 1998, 1205, footnote 211.

⁵⁴⁶ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 101-102. Articles 4, 5, 14, and 8-13 respectively. J. Terhechte, *International Competition Enforcement Law Between Cooperation and Convergence*, Heidelberg, Springer-Verlag, 2011, 71-72.

authorities with sufficient financial means. Moreover, their investigative powers were described in detail (Article 18 f).⁵⁴⁷

Procedurally, the main feature of the DIAC was the establishment of two international organizations. On the one hand the International Antitrust Authority, supported by an International Antitrust Council, would monitor and ensure compliance, more precisely that the national laws of the parties were based on the minimum standards of the Code and that they were enforced. This authority would serve as international executive body and would be entrusted with significant competences: if national authorities refused to take action, it would be able to bring actions against those authorities in that nation's courts; it would be able to sue private firms or sue a party to the agreement before the International Antitrust Panel (see below); it would be allowed to hold a right to appeal; and finally it would assist parties with the enactment and enforcement of competition law (Article 19 sec. 2 *lit. b*).⁵⁴⁸ On the other hand, an International Antitrust Panel would settle disputes via legally binding decisions. The International Antitrust Panel would serve as 'judicial' tribunal for signatory countries,⁵⁴⁹ and would be responsible for disputes between signatory states with regard to the code.⁵⁵⁰ The latter were allowed to bring actions against each other before the Panel if consultations between the parties and the International Antitrust Authority failed. The Panel's decisions would have the same authority as decisions of a WTO dispute resolution panel,⁵⁵¹ and would therefore be legally binding. Moreover, if a national court's decision was inconsistent with the obligations of the agreement, then that court had to reconsider its decision according to the findings of the International Antitrust Panel.⁵⁵² The DIAC also established a right for private parties to recover damages.⁵⁵³

Reactions to the DIAC were diverse. Some described it as 'indicative of what the WTO competition agreement should not be'⁵⁵⁴ and 'hopelessly flawed'.⁵⁵⁵ The Code did meet with some response in Europe.⁵⁵⁶ While the EU supported a multilateral agreement with minimum standards and actively advocated the inclusion of competition law in the WTO-agenda, the US on the other side was very critical towards the Code. US criticism was foreseeable as the Code was heavily influenced by European approaches, identifying prohibited behaviour via conceptual rather than economic approaches. More precisely, criticism targeted the definition of prohibited conduct, unaccountability

⁵⁴⁷ J. Terhechte, *International Competition Enforcement Law Between Cooperation and Convergence*, Heidelberg, Springer-Verlag, 2011, 71-72.

⁵⁴⁸ *Ibid.*, 71; M. Utton, *International Competition Policy: Maintaining Open Markets in the Global Economy*, Cheltenham, Edward Elgar Publishing, 2006, 120.

⁵⁴⁹ D. Gifford, "The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry", *Minnesota Journal of Global Trade*, Vol. 6, No. 2, 1997, 27-28.

⁵⁵⁰ J. Terhechte, *International Competition Enforcement Law Between Cooperation and Convergence*, Heidelberg, Springer-Verlag, 2011, 71-72.

⁵⁵¹ M. Utton, *International Competition Policy: Maintaining Open Markets in the Global Economy*, Cheltenham, Edward Elgar Publishing, 2006, 120.

⁵⁵² B. Peck, "Extraterritorial Application of Antitrust Laws and the U.S.-EU Dispute over the Boeing and McDonnell Douglas Merger: From Comity to Conflict? An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution", *San Diego Law Review*, Vol. 35, 1998, 1205-1206.

⁵⁵³ D. Gifford, "The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry", *Minnesota Journal of Global Trade*, Vol. 6, No. 2, 1997, 24.

⁵⁵⁴ B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 234.

⁵⁵⁵ D. Gifford, "The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry", *Minnesota Journal of Global Trade*, Vol. 6, No. 2, 1997, 29.

⁵⁵⁶ J. Terhechte, *International Competition Enforcement Law Between Cooperation and Convergence*, Heidelberg, Springer-Verlag, 2011, 72.

of very powerful administrators, and unnecessary bureaucratic elements. That it was not necessarily the content of the Code that caused commotion, but rather the very concept of it, was reflected in the fact that the Code was simultaneously criticised both for its broad and often ambiguous wording,⁵⁵⁷ as well as its overly detailed nature.⁵⁵⁸ The US, consistent with its criticism on previous multilateral initiatives, pointed out the diverse goals that are pursued through competition law in several jurisdictions, and the inability of the code to appreciate and further all these goals.⁵⁵⁹ US officials therefore reiterated their preference for increased cooperation rather than a substantial code.⁵⁶⁰

3.3.2 The UNCTAD Code on Restrictive Business Practices - 'the Set'

Twenty years after the ECOSOC-initiative, under the impetus of developing nations in an attempt to gain more control over corporate behaviour in international commerce, the UN undertook another endeavour to engage in international antitrust development.⁵⁶¹ It was perceived that multinational corporations were taking advantage of developing countries and slowing down their economic progress. Demands were crystallized in the form of comprehensive proposals to adjust global economic relationships. This was known during the seventies as the strive towards a 'new international economic order'. Competition law was perceived as a mechanism for redistributing international welfare, redressing the imbalance in bargaining power, and dealing with the paradox of wanting local control over economic development, but simultaneously needing foreign investment to foster such development. Developed nations agreed to negotiate such issues of good corporate behaviour, in return for non-discrimination, promoted investment, and the provision by developing nations of broad latitude for freedom of contract and the operation of market forces.⁵⁶² Consequently, the development of a code on restrictive business practices was placed on the agenda of the United Nations Conference on Trade and Development (UNCTAD),⁵⁶³ established in 1964, "to deal primarily with the economic problems of the developing countries in their relations with the more developed parts of the world."⁵⁶⁴ Preparations for the Code started in the early 1970s, soon after the OECD had issued its first recommendations, which mainly focused on the needs of developed nations (see below, Part I, 3.4). In 1976 a committee of experts received a mandate from the fourth UN Conference on Trade and Development in Nairobi to resolve certain preliminary technical issues. The Code was completed in 1980, where the remaining issues were tackled in two sessions under the auspices of the UN Conference on Restrictive Business Practices. It was unanimously adopted by the

⁵⁵⁷ D. Gifford, "The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry", *Minnesota Journal of Global Trade*, Vol. 6, No. 2, 1997, 4-5.

⁵⁵⁸ W. Fikentscher, "The Draft International Antitrust Code ('DIAC') in the Context of International Technological Integration", *Chicago-Kent Law Review*, Vol. 72, No. 2, 1996-1997, 542.

⁵⁵⁹ D. Gifford, "The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry", *Minnesota Journal of Global Trade*, Vol. 6, No. 2, 1997, 29.

⁵⁶⁰ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 103.

⁵⁶¹ S. Benson, "The U.N. Code on Restrictive Business Practices: an International Antitrust Code is Born", *The American University Law Review*, Vol. 30, 1981, 1031.

⁵⁶² J. Davidow & L. Chiles, "The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct regarding Restrictive Business Practices", *The American Journal of International Law*, Vol. 72, No. 2, 1978, 247-248.

⁵⁶³ M. Taylor, *International Competition Law: a New Dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 130.

⁵⁶⁴ J. Davidow & L. Chiles, "The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct regarding Restrictive Business Practices", *The American Journal of International Law*, Vol. 72, No. 2, 1978, 252, footnote 27.

UN General Assembly in Resolution 35/63 of 5 December 1980, in the form of a recommendation addressing both states and enterprises, named ‘Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices’, also known as ‘the Set’.⁵⁶⁵

As mentioned, what is particular about this Set is that it has a particular focus on furthering the competition systems of developing countries. However, the final Set was very different from the one originally envisaged by the developing countries, who desired a detailed binding instrument. Developed countries wanted the Set to be no more than ‘an instrument of moral persuasion’ and insisted that therefore it should remain a voluntary instrument, reiterating again, and perhaps more validly this time due to the parties involved, the disparities in development and approaches to competition law among the members of the UN.⁵⁶⁶ Pressure of developed countries therefore resulted in a set of non-binding recommendations and voluntary guidelines.⁵⁶⁷ This legally non-binding nature is reflected in the form as well as the substance of the Set (in particular provisions for implementation and enforcement).⁵⁶⁸ Developing countries suggested that the Secretary-General of the UN be vested with a power to convene consultations, instead a non-binding consultative mechanism was established.⁵⁶⁹ The Set was furthermore limited to the antitrust principles that were already reflected in the national laws of developed countries and the aforementioned OECD Guidelines. The novelty of the Set as envisaged by developing countries, namely that it would include preferential treatment of companies in developing countries was opposed by developed nations, who wanted the Set to be universally applicable and providing for fair and non-discriminatory treatment of enterprises by states.⁵⁷⁰

In the Set, states rather than an international body remain the central actors in the prevention and control of anticompetitive behaviour in international trade. Issues that arise under the Set are dealt with by an Intergovernmental Group of Experts on Competition Law and Policy, which monitors the application and implementation of the Set, provides a forum for discussion and undertakes studies related to the Set.⁵⁷¹

Even though the Set would not be legally binding, reaching consensus proved to be difficult,⁵⁷² mainly because the provisions should “*serve as general principles for the developed countries and yet also be*

⁵⁶⁵ The United Nations Set of Principles and Rules on Competition 1980 (The UN Set), The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, TD/RBP/CONF/10/Rev.2.

⁵⁶⁶ J. Davidow & L. Chiles, “The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct regarding Restrictive Business Practices”, *The American Journal of International Law*, Vol. 72, No. 2, 1978, 254.

⁵⁶⁷ M. Taylor, *International Competition Law: a New Dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 131.

⁵⁶⁸ S. Benson, “The U.N. Code on Restrictive Business Practices: an International Antitrust Code is Born”, *The American University Law Review*, Vol. 30, 1981, 1033.

⁵⁶⁹ The United Nations Set of Principles and Rules on Competition 1980 (The UN Set), The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, TD/RBP/CONF/10/Rev.2, Part IV, section F, 4.

⁵⁷⁰ S. Benson, “The U.N. Code on Restrictive Business Practices: an International Antitrust Code is Born”, *The American University Law Review*, Vol. 30, 1981, 1032.

⁵⁷¹ The United Nations Set of Principles and Rules on Competition 1980 (The UN Set), The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, TD/RBP/CONF/10/Rev.2, Part IV, Section G.

⁵⁷² D. Gill, “The UNCTAD Restrictive Business Practices Code: a Code for Competition?”, *International Lawyer*, Vol. 13, 1979, 616.

sufficiently specific to meet the interests of the developing countries.”⁵⁷³ According to GILL the title ‘multilaterally agreed’ is misleading as wide areas of disagreement consisted.⁵⁷⁴ One essential area of disagreement was on the role that should be played by competition law. Another area of disagreement included the prohibition of export cartels.⁵⁷⁵ GILL states that general principles such as those imbedded in the Set, are often “no more than polite statements of disagreement” and represent just another step in the “continuing process of international education in and acceptance of competition as a rule for business conduct.”⁵⁷⁶ DAVIDOW as well observed that for most Western European countries involved in the negotiations the process was the actual product.⁵⁷⁷

Some claim that due to its voluntary nature the impact of the Set is limited and its existence is not widely known.⁵⁷⁸ Indeed, the Set was not revolutionary (as it was originally intended to be), but it did focus attention on young and developing competition systems. BENSON rightly observed that because of the non-legally binding nature of the Set, its success will depend on its continued acceptance by the members as being a fair and balanced document. Considering the large variety of parties involved, this was, and will continue to be, a very difficult exercise. The success of the Set has been attributed by some to its narrow and technical focus. The Set enjoys substantial moral authority, considering its universal acceptance as a UN recommendation.⁵⁷⁹ Its influence as a UN soft law instrument cannot be overlooked, and since its adoption its legitimacy has been reaffirmed by several United Nations Conferences to Review All Aspects of the Set under the auspices of UNCTAD, every five years since 1985.⁵⁸⁰

3.3.3 WTO from Singapore to Cancun

3.3.3.1 The build-up

The nineties saw the birth of an even more ambitious endeavour towards an international competition law. While the GATT originally did not contain any specific competition provisions, and when the issue revived in the late 1950s it was considered that it would be impractical,⁵⁸¹ the EU nevertheless was the main proponent of a global competition policy initiative within the framework of the WTO.⁵⁸² The EU’s preference for binding mechanisms likely derives from its unique domestic experience with regional integration, where (partial) harmonisation of competition laws takes place

⁵⁷³ J. Davidow & L. Chiles, “The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct regarding Restrictive Business Practices”, *The American Journal of International Law*, Vol. 72, No. 2, 1978, 249.

⁵⁷⁴ D. Gill, “The UNCTAD Restrictive Business Practices Code: a Code for Competition?”, *International Lawyer*, Vol. 13, 1979, 607.

⁵⁷⁵ M. Taylor, *International Competition Law: a New Dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 130-131.

⁵⁷⁶ D. Gill, “The UNCTAD Restrictive Business Practices Code: a Code for Competition?”, *International Lawyer*, Vol. 13, 1979, 615.

⁵⁷⁷ Ibid.

⁵⁷⁸ M. Taylor, *International Competition Law: a New Dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 132.

⁵⁷⁹ S. Benson, “The U.N. Code on Restrictive Business Practices: an International Antitrust Code is Born”, *The American University Law Review*, Vol. 30, 1981, 1031, 1036, 1048.

⁵⁸⁰ See for the latest conference <http://unctad.org/en/Pages/MeetingsArchive.aspx?meetingid=17888>, accessed 4 December 2013.

⁵⁸¹ I. Maher, “Competition law in the international domain: networks as a new form of governance”, *Journal of Law and Society*, Vol. 29, No. 1, March 2002, 121.

⁵⁸² U. Aydin, “Promoting Competition: European Union and the Global Competition Order”, paper prepared for presentation at the Biennial Conference of the EUSA, Los Angeles, CA, 23-25 April 2009, 3.

while binding dispute resolution occurs through the General Court and Court of Justice of the EU.⁵⁸³ Moreover, EU officials believe less strongly than Americans do in the possibility of a smooth convergence of competition systems via informal and bilateral cooperation, possibly influenced by the relatively slow and incomplete convergence of Member States' competition laws, even under the obligations imposed by the Treaties.⁵⁸⁴ These experiences may lead to a natural tendency to support a binding multilateral approach via an international organization such as the WTO.⁵⁸⁵ It should be noted, however, that SIR LEON BRITTAN and DG Trade were the primary advocates of this position. DG COMP was not in favour of promoting competition measures in the WTO.⁵⁸⁶

Competition policy was considered as a possible topic for future WTO work at the 1994 Ministerial Conference at Marrakesh, but the 1995 report 'Competition policy in the New Trade Order: strengthening international cooperation and rules', drafted by experts from both the Commission and external bodies, provided the impetus for the start of true reflection on the matter.⁵⁸⁷ The Report, labelled 'the van Miert Report', was initialled by the European Competition Commissioner at that time, KAREL VAN MIERT, who instructed a group of 'Wise Men' to progressively reflect on the ways to organise antitrust in the global era. In this report the idea of an international agreement on competition within the WTO was proposed. Starting with provisions on cooperation and aid to new antitrust regimes, it was suggested that the agreement could later on evolve to incorporate more far-reaching commitments, and finally result in a comprehensive substantive agreement.⁵⁸⁸ In the end the agreement should commit WTO Members to gradually introduce competition laws and strong enforcement procedures. Members should adhere to core principles of competition law, including non-discrimination, transparency, and the prohibition of hard core cartels. Cooperation mechanisms between national competition authorities should be established and the WTO dispute settlement mechanism should apply.⁵⁸⁹

When the Commission issued a communication to the Council explaining its views on an international framework for competition rules,⁵⁹⁰ the report already received substantial criticism from the American corner, which led to the watering down of its content. According to this new version of the proposal, substantively only cartels should be included in the negotiations of an international antitrust agreement, and dispute resolution was scaled down.⁵⁹¹ The original plans of the

⁵⁸³ C. Damro, "Destructive Issue linkages: the International Politics of EU Failure", *The Antitrust Bulletin*, Vol. 57, No. 3, 2012, 565.

⁵⁸⁴ U. Aydin, "Promoting Competition: European Union and the Global Competition Order", paper prepared for presentation at the European Union Studies Association 11th Biennial International Conference, Los Angeles California, 23-25 April 2009, 22.

⁵⁸⁵ C. Damro, "Destructive Issue linkages: the International Politics of EU Failure", *The Antitrust Bulletin*, Vol. 57, No. 3, 2012, 571.

⁵⁸⁶ C. Damro, "The new trade politics and EU competition policy: shopping for convergence and co-operation", *Journal of European Public Policy*, Vol. 13, No. 6, September 2006, 878.

⁵⁸⁷ A. Heimler, "EU Foreign policy tools/Competition policy" in F. Bindi (ed.), *The Foreign Policy of the European Union: Assessing Europe's Role in the World*, Massachusetts, Brookings Institution Press, 2010, 87; European Commission, Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules – Report of the Group of Experts, COM(95)359 final, 12 July 1995.

⁵⁸⁸ E. Fox & D. Crane, *Global Issues in Antitrust and Competition Law*, St. Paul, Thomson Reuters, 2010, 532.

⁵⁸⁹ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford University Press, Oxford, 2016, 187.

⁵⁹⁰ European Commission, Towards an international framework of competition rules, Communication to the Council, COM(96)284 final, 18 June 1996. Also see K. van Miert, "International Cooperation in the Field of Competition: a view from the EC" in B. Hawk (ed.), *1997 Fordham Corporate Law Institute International Antitrust Law and Policy Conference*, New York, Fordham Corporate Law Institute, 1998, 13-25.

⁵⁹¹ E. Fox & D. Crane, *Global Issues in Antitrust and Competition Law*, St. Paul, Thomson Reuters, 2010, 532, 558.

EU for the inclusion of competition law in a WTO-context indeed included relatively advanced cooperation provisions as could be found in bilateral cooperation agreements, some minimum substantive principles for cross-border cases, with priority given to business practices which have a foreclosure effect. This was subsequently restricted to hard-core cartels only. Developing countries were to receive particular support for the progressive reinforcement of their competition laws and institutions. Furthermore, focus lay on the core principles of non-discrimination, transparency and procedural fairness. The EU originally intended the WTO dispute settlement mechanism to review four distinct types of possible disputes in competition cases: international procedural obligations, per-se prohibitions, rule-of-reason violations, and impediments to market access. This was later on adapted to exclude individual cases.⁵⁹²

The Commission's proposal was picked up by the WTO during its 1996 Ministerial Meeting in Singapore and, driven by a wish for greater policy-coherence, a working group was created to study the interaction between trade and competition policy.⁵⁹³ The Working Group on the Interaction between Trade and Competition held its first meeting in July 1997.⁵⁹⁴ The group was to focus on the clarification of core principles such as transparency, non-discrimination, procedural fairness, provisions on hard-core cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building.⁵⁹⁵ During the 2001 Doha Round it was agreed that negotiations would take place after the Fifth Session of the Ministerial Conference, provided there was consensus on the modalities of such negotiations.⁵⁹⁶ Intense preparatory work took place since 1997 on the so-called 'Singapore issues', leading up to the 2003 Conference.⁵⁹⁷

3.3.3.2 The demise

The preparations did not result in a balanced package and an agreed work programme that would bring together the mandated negotiations (agriculture, services) and the 'new' Singapore-issues.⁵⁹⁸ The EU's advocating efforts failed with the collapse in 2003 of negotiations at the Cancun Ministerial Conference.⁵⁹⁹ During these negotiations, which took place from 10 to 14 September 2003, it was decided that competition policy would henceforth be excluded from the Doha negotiations, due to lack of consensus on modalities for negotiations in this area. This decision was made official on 1 August 2004 via the General Council's Decision on the post-Cancun Work

⁵⁹² A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 213-224. Also see http://www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm (accessed December 2013) and J. Rennie, "Competition regulation in SAFTA, AUSFTA and TAFTA: a spaghetti bowl of competition provisions?", *International Trade Law & Regulation*, Vol. 13, No. 2, 2007, 34.

⁵⁹³ The other two working groups established during that meeting dealt with government procurement and the relationship between trade and investment. P. Gallagher, *The First Ten Years of the WTO 1995-2005*, Cambridge, Cambridge University Press, 2005, 37-39.

⁵⁹⁴ A. Melamed, "International Cooperation in Competition Law and Policy: What can be Achieved at the Bilateral, Regional, and Multilateral levels", *Journal of International Economic Law*, Vol. 2, No. 3, 1999, 431.

⁵⁹⁵ A. Guzman, "International Competition Law" in A. Guzman and A. Sykes (eds), *Research handbook in international economic law*, Cheltenham, Edward Elgar Publishing, 2007, 424.

⁵⁹⁶ http://www.wto.org/english/tratop_e/comp_e/history_e.htm#doha (accessed December 2013). See WTO, Ministerial Conference, Singapore - Singapore Ministerial Declaration - Adopted on 13 December 1996, WT/MIN(96)/DEC, 18 December 1996.

⁵⁹⁷ P. Gallagher, *The First Ten Years of the WTO 1995-2005*, Cambridge, Cambridge University Press, 2005, 102.

⁵⁹⁸ *Ibid.*, 80.

⁵⁹⁹ C. Damro, "Destructive Issue linkages: the International Politics of EU Failure", *The Antitrust Bulletin*, Vol. 57, No. 3, 2012, 563.

Programme, the so-called 'July package'.⁶⁰⁰ The concrete provocation of the failure of the negotiations was that near the end of the Cancun conference the African Union expressed that it was determined not to agree on any deal regarding the Singapore issues. South Korea retaliated by claiming that it would not agree to any deal without an agreement on all four of the Singapore issues. This stalemate can be considered the main reason behind the failure of the talks.⁶⁰¹

Unsurprisingly, opposition was voiced most strongly by the US, and perhaps more astonishingly by developing countries. The US reiterated its belief that sufficient consensus was lacking, and more specifically due to insufficient experience on the part of developing countries. Opposition by the US arose as well due to the aforementioned confidence in convergence (toward the US standard) via cooperation agreements. PAPADOPOULOS referred to this attitude as 'the hegemonic stance', denoting a consistent belief in the superiority of US antitrust law and the fact that "*until other countries reach the US level of competition enforcement, national US competition law should be applied to resolve situations where US firms are harmed due to inefficient enforcement of national competition laws by other countries.*"⁶⁰² The US feared that a WTO agreement on competition policy would lead to the harmonisation of competition rules based on the EU model.⁶⁰³ Timing was therefore a crucial factor. Stronger players in the competition field were likely convinced that if they waited with the conclusion of an international agreement on competition law, this would be more favourable to them as convergence towards the national system would take place over time.⁶⁰⁴ The US also believed that competition standards could be distorted due to the *quid pro quo* nature of WTO negotiations, and the fact that any result would be the lowest common denominator, resulting in a race to the bottom. In the minds of both politicians and academics the concern existed that WTO-compromises would risk resulting in 'populist antitrust divorced from economic underpinnings' because in the course of negotiations certain principles would be accepted that would not directly relate to the 'proper function' of competition law, according to US standards.⁶⁰⁵ Another concern was that the use of dispute settlement and the adversarial nature of the WTO panels would undermine mutual trust and lead to politicisation of the application of competition rules, although this argument is not fully valid considering that many disputes are resolved informally.⁶⁰⁶ Finally, the US tackled the timing of the endeavour. KLEIN, head of the DoJ Antitrust Division at the time, found it too early to include competition law in the WTO, in particular considering the lack of experience of the institution in this regard. Such 'prematurity', according to him, could actually injure sound competition law enforcement rather than promote it.⁶⁰⁷ Considering all these objections, it is somewhat puzzling why the US accepted to include competition policy as an agenda-item for Doha in the first place. One aspect that has likely played a

⁶⁰⁰ http://www.wto.org/english/tratop_e/comp_e/history_e.htm#doha (accessed December 2013).

⁶⁰¹ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 234.

⁶⁰² Ibid., 225-227.

⁶⁰³ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford University Press, Oxford, 2016, 184.

⁶⁰⁴ E. Elhauge & D. Geradin, *Global Competition Law and Economics*, 2nd ed., Oxford and Portland Oregon, Hart Publishing, 2011, 1246.

⁶⁰⁵ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 229, 263.

⁶⁰⁶ I. Maher, "Competition Law in the International Domain: Networks as a New Form of Governance", *Journal of Law and Society*, Vol. 29, No. 1, 2002, 129 and A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 226.

⁶⁰⁷ J. Tavares de Araujo, Jr., "Competition policy and the EU-Mercosur trade negotiations", paper prepared for the Working Group on EU-Mercosur Trade Negotiations, Paris, 12-13 May 2000, 2.

role in this decision is a divide between the US trade and antitrust administration, the former being more open to the idea of adopting WTO-competition rules than the latter.⁶⁰⁸

The proposed sanctioning of unfulfilled domestic enforcement obligations scared developing countries. They feared to be most subject to these sanctions due to their limited resources and general concerns regarding their ability to implement the proposed reforms and the consequences this may have with regard to the WTO Dispute Settlement Mechanism.⁶⁰⁹ The regulatory and political cost of an effective competition system would be high.⁶¹⁰ Indeed, effective antitrust enforcement is costly and requires a high degree of expertise in the form of institutional capacity and political and ideological backing, which developing countries not necessarily possess.⁶¹¹ While this could be resolved through technical assistance and flexibility in the form of funding or transfer payments, as acknowledged by the initial Doha declaration, developing countries did not consider the safeguards for such assistance sufficient, and feared that the dependency that would be created in this way would deprive them of equal influence on policy decisions.⁶¹² Their fear was not entirely ungrounded, as previously negotiated provisions on technical assistance had not been implemented without problems (or sometimes at all). Accepting further commitments on competition enforcement, which furthermore is not a priority for a number of developing countries, would therefore create an even greater financial burden for developing countries.⁶¹³

Developing countries also saw the Singapore issues as a distraction from discussions on agricultural subsidies or standards and technical barriers. Moreover, some of the proposed reforms were perceived to be destructive for the competitive advantages of developing countries over developed countries.⁶¹⁴ Developing nations indeed have different needs and expect different things from a competition policy than developed countries, for instance due to larger production-inefficiency. Political economies vary, and a multilateral WTO-agreement might be more adapted to the needs of developed nations. While some exceptions on strict enforcement might be conceivable in the beginning, it was reasonable of developing nations to fear “*that once any international antitrust authority was created, it would be hard to stop its expansion to cover the full range of competition law issues.*”⁶¹⁵ A striking example of the dominance of developed countries in the shaping of a competition policy within the WTO was the planned exemption of export cartels, mainly supported by the US.⁶¹⁶

The reason why some considered the opposition of developing countries as rather surprising, apart from the circumstance that it were in fact the developing countries that originally suggested

⁶⁰⁸ For a more elaborate analysis of this issue, see A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 230-231.

⁶⁰⁹ M. Gal, “Review Essay: New Perspectives on International Antitrust”, *The American Journal of International Law*, Vol. 106, 2012, 408. B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford University Press, Oxford, 2016, 235.

⁶¹⁰ I. Maher, “Competition Law in the International Domain: Networks as a New Form of Governance”, *Journal of Law and Society*, Vol. 29, No. 1, 2002, 129.

⁶¹¹ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford University Press, Oxford, 2016, 185.

⁶¹² E. Elhaage & D. Geradin, *Global Competition Law and Economics*, 2nd ed., Oxford and Portland Oregon, Hart Publishing, 2011, 1243.

⁶¹³ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 238.

⁶¹⁴ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford University Press, Oxford, 2016, 235.

⁶¹⁵ E. Elhaage & D. Geradin, *Global Competition Law and Economics*, 2nd ed., Oxford and Portland Oregon, Hart Publishing, 2011, 1244-1245.

⁶¹⁶ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 238-239.

multilateral negotiations on competition,⁶¹⁷ is related to the fact that rationally, developing countries have every reason to support a strict international agreement. Developing countries worried about overly intrusive antitrust enforcement even though they are among those suffering the most of the under-enforcement of large international cartels. According to ELHAUGE and GERADIN “[u]nless the developed nations are unable to effectively enforce their antitrust laws against export cartels in small or developing nations because of problems in procuring evidence or penalizing assets in the latter nations, small or developing nations would seem to lack any strategic reason to oppose international antitrust enforcement.”⁶¹⁸ That developing nations did in fact oppose the agreement therefore demonstrates that external factors, not related to mere rational competition-law related arguments, are at play. Competition policy is indeed closely related to and intertwined with trade policy and industrial policy, which makes it a very sensitive topic in international negotiations. Developing countries place a lot of emphasis on industrial policy, which allows them to strengthen their firms and their competitiveness on the international market. This influences their stance towards competition policy. They wished to see broad industrial policy exceptions included in a WTO competition law. It is true that many industrialised countries pursued social and political objectives via extensive exemptions from the application of competition rules, while more efficiency-related objectives were only prioritised at a later time. This demand would likely not have become an insurmountable obstacle to the negotiations, as the Doha Declaration already took these arguments into account by introducing the notion of flexibility, and clear-cut exemptions would have been accepted by the EU.⁶¹⁹

Another cause of opposition of developing countries was their dissatisfaction with the process of negotiations on agriculture.⁶²⁰ In general, it was insufficiently clear to developing countries what the alleged trade-related benefits would be of the addition of competition policy to the negotiating agenda. Due in part to an information asymmetry, developing countries viewed competition policy as a threat to their interests.⁶²¹ This demonstrates the risk attached to issue-linkages: it may cause negotiations on a certain topic to fail due to negotiations on substantively entirely unrelated points. DAMRO defined the concept of issue-linkage as a negotiating tactic causing the likelihood of failure to increase or decrease, thereby referring to the definition by SEBENIUS, who described issue-linkage “as a situation in which issues are ‘simultaneously discussed for joint settlement.’”⁶²² Issue-linkage may decrease chances of failure by employing trade-offs, log-rolling or side-payments, or it may do the opposite by expanding the range for disagreement.⁶²³ The WTO in particular is a forum in which member states pursue a wide range of possibly conflicting aims. PAPADOPOULOS claimed, based on interviews with EU Commission officials, that the EU proposal for a competition agreement at the WTO was the initiative of DG Trade. DG COMP was hesitant about the WTO as the forum of choice for the development of competition rules, exactly because it preferred avoiding linking issues such as trade and non-trade goals. It also wished to avoid an increased likelihood of political intervention in the

⁶¹⁷ Ibid., 232.

⁶¹⁸ E. Elhauge & D. Geradin, *Global Competition Law and Economics*, 2nd ed., Oxford and Portland Oregon, Hart Publishing, 2011, 1242-1243.

⁶¹⁹ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 235-236, 263.

⁶²⁰ Ibid., 263.

⁶²¹ C. Damro, “Destructive Issue linkages: the International Politics of EU Failure”, *The Antitrust Bulletin*, Vol. 57, No. 3, 2012, 565, 581.

⁶²² J. Sebenius, “Negotiation Arithmetic: Adding and Subtracting Issues and Parties”, *International Organization*, Vol. 37, 1983, 287, as cited in C. Damro, “Destructive Issue linkages: the International Politics of EU Failure”, *The Antitrust Bulletin*, Vol. 57, No. 3, 2012, 567.

⁶²³ C. Damro, “Destructive Issue linkages: the International Politics of EU Failure”, *The Antitrust Bulletin*, Vol. 57, No. 3, 2012, 567.

performance of its mandate.⁶²⁴ GALLAGHER moreover claimed that “*it was the single undertaking that forced retrenchment: when everything on the table forms part of the final ‘package’ of agreements, the stakes placed on the table at the start of negotiations are as crucial as the deals done at the end.*”⁶²⁵ In a ‘take it or leave it’ scenario, the slightest dissatisfaction may indeed cause the whole package to fail.

The demands of globalisation have pressed certain members in taking on a hectic pace for the negotiations and including additional domains of economic regulation such as competition policy. This ‘pressure’ was not felt by all members, and some did not feel ready to take on multilateral obligations in this field. The abundance of other international and non-binding forums such as the OECD or UNCTAD that offered the possibility to negotiate the trade-competition linkage, took away the sense of urgency to deal with this matter in the WTO.⁶²⁶ The EU realised that by insisting on the inclusion of competition in the WTO it would eventually see significant efforts go to waste and therefore broadened its horizon and decided to pursue competition law and policy in every possible international forum.⁶²⁷ A number of countries requested clarification on existing issues, prior to launching new negotiations.⁶²⁸ This was supported later on by more members, in particular Least-Developed, African, Asian and Latin American countries. The priority attached to the new Singapore issues caused friction among members, some urging to first implement the agreements already concluded under the Uruguay Round. The attempt to decide on issues that did not yet reach consensus and the suggestion of starting to develop modalities for negotiations on investment and competition policy and to start negotiations on government procurement and trade facilitation created the perception among many developing country ministers that this was an attempt to hastily force such issues into the single undertaking, dismissing their objections. Apart from the untimeliness, another criticism was that some of the annexes containing options to begin negotiations were not sufficiently distributed by the proponents and discussed among members. Some annexes were only discussed in small group meetings, thereby excluding some members of discussing the modalities proposed.⁶²⁹

Criticism did not only come from within, but from outsiders and the general public as well. The increasing price of WTO-accession, its lack of openness and accountability as well as its heavy bureaucratic nature allegedly made the venue less attractive for a multilateral agreement including competition issues.⁶³⁰

3.3.4 Other initiatives

⁶²⁴ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 242-243.

⁶²⁵ P. Gallagher, *The First Ten Years of the WTO 1995-2005*, Cambridge, Cambridge University Press, 2005, 33.

⁶²⁶ C. Damro, “Destructive Issue linkages: the International Politics of EU Failure”, *The Antitrust Bulletin*, Vol. 57, No. 3, 2012, 583.

⁶²⁷ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 244.

⁶²⁸ WTO, General Council – Proposals for Inclusion in the Draft Text for Cancun, Communication from Benin, Botswana, Kenya, Mauritius, Nigeria, Senegal, Sierra Leone, Tanzania, Uganda, Zambia and Zimbabwe, WT/GC/W/510, 14 August 2003.

⁶²⁹ P. Gallagher, *The First Ten Years of the WTO 1995-2005*, Cambridge, Cambridge University Press, 2005, 118-119, 126-127, 134-135. Also see WTO, Ministerial Conference - Fifth Session - Cancun, 10 - 14 September 2003 - ACP Declaration on the Fifth Ministerial Conference of the WTO, Communication from Botswana, WT/MIN(03)/W/4, 1 August 2003.

⁶³⁰ P. Gallagher, *The First Ten Years of the WTO 1995-2005*, Cambridge, Cambridge University Press, 2005, 126-127.

The overview of multilateral initiatives provided in this Part I is not exhaustive. Many other initiatives, most of them rather short-lived, can be mentioned. As an example, the 1951 draft convention of the Council of Europe can be mentioned, which shared many characteristics with earlier initiatives like the Havana Charter or the ECOSOC project. The 1951 draft convention foresaw a compulsory public registration of international restrictive business agreements, and private persons injured by such practices would be able to bring their complaint before a special commission. If this commission did not succeed in settling the case, it would be referred to a European court, which could then award damages or impose fines, or render declaratory judgments which would allow national authorities to intervene. This system was inspired by the enforcement mechanism of the European Convention on Human Rights, but in 1958 the project was deferred without further action. Agreement was lacking on “*a common substantive standard for judgment of the legality of international restraints of trade.*”⁶³¹ Again, the ambition of the project did not align with reality.

The same fate awaited another, more original project within the Council of Europe, initiated in 1965. This time the aim was not to establish a set of uniform substantive principles, but rather to develop for the first time a system to avoid jurisdictional conflicts emerging from the extraterritorial application and enforcement of national competition laws. A preliminary study was conducted to establish a uniform rule of jurisdiction that would be recognized in all contracting countries. It soon became apparent, however, that the preliminary study suffered from a great deal of legal and political problems. Once again, it proved too ambitious to expect parties to adhere to a formal and binding obligation to recognise foreign extra-territorial antitrust action and to give legal assistance to foreign courts and authorities in the presence of significantly differing antitrust laws.⁶³²

3.4 The OECD Recommendations and the switch to the bilateral level

The issuing of recommendations concerning cooperation between member countries on anticompetitive practices affecting international trade by the OECD in 1967 marks one of the first occasions where a multilateral soft law instrument was truly successful in the field of international competition law cooperation.⁶³³ The OECD recommendations did not focus on the development of substantive principles, as did previous multilateral initiatives, but rather focused on the promotion of voluntary cooperation. A Committee of Experts on Restrictive Business Practices was established, which originally mainly focused on comparative competition law developments, but later broadened its view to include restraints of trade in international commerce. This resulted in the creation of two working parties, working respectively on the factual side of the problem in order to obtain a better factual basis for discussion, and the procedural aspects, including the various ways and means of cooperation within OECD.⁶³⁴

The first recommendation on international competition law enforcement cooperation issued by the OECD was the 1967 Council Recommendation Concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade. It encouraged the notification of investigations involving other members’ important interests and suggested that other authorities take this into account and consult with each other, promoted coordination of actions when several jurisdictions are dealing with the same case, and stimulated the supply of information

⁶³¹ K. Markert, “Recent Developments in International Antitrust Cooperation”, *Antitrust Bulletin*, No. 13, 1968, 364.

⁶³² *Ibid.*, 364-366.

⁶³³ Other multilateral organisations such as UNCTAD and the ICN also issued valuable guidelines and best practices. These institutions and their output will be discussed in Part III of this study.

⁶³⁴ K. Markert, “Recent Developments in International Antitrust Cooperation”, *Antitrust Bulletin*, Vol. 13, 1968, 360-361.

on anti-competitive practices within the limits of national laws, not affecting national sovereignty or extra-territorial application of competition laws.⁶³⁵ As ZANETTIN put it, the Recommendations “*were exploring virgin fields*”, which may explain their rather superficial character.⁶³⁶ They were revised on several occasions. As their main content has largely been taken over and developed in bilateral cooperation agreements, a more detailed analysis of the cooperation mechanisms will take place in Part II.

The first revision took place in 1973 and resulted in the Recommendation Concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade. It is recognized therein that closer cooperation is needed. The principle of positive comity was introduced (see below, Part II, 2.2.4) as well as an arbitration/consultation procedure that should be followed when the interests of a member are affected by anti-competitive business behaviour in foreign jurisdictions, whereby a committee of experts would attempt to reach conciliation. In 1979 both previous recommendations were repealed and substituted by one version. This version was further refined in 1986, which added an interpretative appendix holding a set of ‘Guiding Principles’, clarifying the existing procedures. Further enhancement took place in 1995, in the Recommendation Concerning Co-operation between Member Countries on Anti-Competitive Practices Affecting International Trade, which was revised again in 2014.⁶³⁷ In the 1995 version, more emphasis was put on efficient cooperation and coordination of investigations and assistance. This is both due to the merger wave in the nineties and the inspiration coming from successful EU/US cooperation.

The newest Recommendations, adopted on 16 September 2014 changed focus to a certain extent, following an elaborate OECD study on the challenges of international cooperation in competition law enforcement in the same year.⁶³⁸ While the classical topics of notification, consultation, coordination and comity are present, the field of cooperation is broadened, and the focus is more on information sharing. The new Recommendations wished to offer enforcers innovative solutions to problems of international cooperation, such as the introduction of national ‘information gateways’, allowing confidential information exchange without prior source consent, or enhanced cooperation in the form of investigative assistance. The Recommendations also commend explicitly a certain commitment from members to effective international cooperation.

The success of the Recommendations lies in the fact that many (bilateral) cooperation agreements almost literally incorporated the principles developed in the recommendations.⁶³⁹ In theory the OECD Recommendations could serve as a sufficient legal basis for states to cooperate internationally within their national legal limits. In practice, however, the majority of OECD member states (endorsing the principles of the recommendations) that engage in international cooperation prefer to conclude bilateral agreements on the application of their respective competition laws.

⁶³⁵ OECD, Recommendation Concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade, C(67)53, 5 October 1967.

⁶³⁶ B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 54.

⁶³⁷ OECD, International Co-operation – Stocktaking Exercise of the Competition Committee’s Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 3, 5.

⁶³⁸ OECD, Recommendation of the OECD Council Concerning International Co-operation on Competition Investigations and Proceedings, C(2014)108, 16 September 2014; OECD, “Challenges of International Co-operation in Competition Law Enforcement”, 2014, available at <http://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf> (accessed January 2015).

⁶³⁹ In a later stage, the recommendations have been influenced by the existing competition cooperation agreements. B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 56.

4. Intermediate conclusion Part I

Discussions on international competition law have occurred since the appearance of competition laws in Europe. The need for such discussions has only augmented, considering the increasingly international nature of economic relations, and the growing number of national laws and authorities attempting to regulate such relations. That the global economy requires some kind of international approach regarding competition law enforcement is beyond doubt. What form this international response should take, however, is subject to much debate. The legal nature of such an arrangement, the number of parties involved, the areas of focus, or the level of formality are all aspects that may vary, each with particular benefits and drawbacks.

When deciding whether to cooperate multilaterally or bilaterally, account must be made of the level of trust between the parties and the desired intensity of cooperation, certain power dynamics, issues of inclusiveness, and the reach and impact of the cooperation mechanism. A choice must also be made (even though both are not mutually exclusive) between a focus on enforcement cooperation or on convergence or harmonisation efforts. Convergence and harmonisation efforts have the benefit of simplifying the legal environment and thereby reducing transaction costs and increasing legal certainty, but it was demonstrated above that uniform rules are not achievable and not desirable. Enforcement cooperation is a more realistic option that can render law enforcement more effective and efficient and attenuate conflict, but has the disadvantage that it is often unable to solve fundamental disagreements between nations. Of particular importance when analysing bilateral cooperation agreements is whether a formal agreement is needed or whether informal cooperation is preferable. While informal cooperation certainly has its benefits, the main drawback is that it offers little transparency. As cooperation between enforcers cannot guarantee a successful outcome, it is crucial that it at least can ensure that there can be trust in the process. Transparent, formal, agreements can help achieve that transparency and create that trust. A final distinction is the one between hard and soft law. This study acknowledges that the distinction is not binary, but a continuum exists along factors such as obligation, delegation, and precision. Both options have advantages and disadvantages. On the one hand soft law can offer flexibility in procedure and effects, often entails less contracting costs and implementation costs, can be as effective as hard law, and can break through or avoid a deadlock. However, soft forms of law can disrupt the institutional balance in the EU, can suffer from democratic deficit and limited transparency, and the pick and choose that may be paired with the flexibility offered by such legislation may lead to uncertainty. Soft law may also just be a smokescreen to mask lack of true agreement and commitment, and may be a vehicle of protectionism. On the other hand, hard law is less flexible and generally costlier to achieve, but offers more certainty and a stronger commitment, and is created according to democratically approved procedures.

Difficult choices must therefore be made, and preferences have varied over time. Early efforts to deal with the extraterritorial effects of anticompetitive behaviour were characterised by their (over)ambitious goals. The initial reaction of states to the effects of global competition was to try to actively create a set of uniform hard substantive principles that would be supported by a large number of members. Such principles were strongly embedded in a trade context, in an attempt to address both public and private restraints to international trade. A supranational enforcer would ensure adherence to the agreed text. Examples are the 1927 World Economic Conference, the Havana Charter, and the ECOSOC initiative. Remarkable is the role played by the US during this period. While the US several times was the initiator of multilateral projects, it was also the first to abandon the projects when they steered away from the US-preferred standard. The failure of these

multilateral efforts can be explained by the fact that the ambition shared by these projects did not seem to arise out of a true desire to reach an international common standpoint. It was rather an attempt by dominant jurisdictions to reach harmonisation towards their national standard. This is testimony of a ‘competition between interests’. This theory seeking to explain innovations in governance suggests that institutions are shaped by the consciously enacted strategies of self-interested actors, rather than the logic of evolution, and that institutional innovation is a product of competition over transnational policy.⁶⁴⁰ More specifically, (neo)Marxist theories view global governance as ‘the executive committee of the global bourgeoisie’, reflecting the economic interests in powerful states. Focus is thereby on the role played by multinational corporations and the interests of capital(ist actors).⁶⁴¹ In the history of international competition law, this dynamic is indeed apparent from the US’ repeated position that there was insufficient agreement on the basics of competition law, on its goals and underlying theories, to move forward, despite being the initiator of many of the projects. PAPADOPOULOS, when analysing the failure of the WTO negotiations on competition law, used the fact that neither the US nor the EU, jurisdictions with mature competition systems, enthusiasm for competition law and expressed antipathy towards cartels, were willing to accept a commitment on the prohibition of export cartels to demonstrate that “*what is of utmost importance in the context of the negotiations of competition at the international level is the reassurance that national interests are satisfied before any sort of mutual commitments may be made.*”⁶⁴² This finding is valid for all attempts at a global code discussed in this study. While external events and issues not directly related to competition law did play a role in the demise of some of the past attempts at harmonisation, growing experience of states with competition law exposed underlying complexities and sensitivities. A significant lack of agreement on the essence of competition law became apparent and prevented any form of harmonisation. Again referring to the example of the WTO negotiations, it is telling that even the watered down proposal of the EU containing basic principles such as non-discrimination, transparency, due process, a provision on hard-core cartels, and modalities for cooperation and technical assistance, was unable to evoke consensus.⁶⁴³ The time was not ripe for a formal international agreement on the matter.

It should be noted that even if the external factors that stood in the way of a global antitrust regime in the past are no longer present today,⁶⁴⁴ an attempt to create global rules remains complex at present as well. A lot more countries have experience with competition law, and are more willing to push through their preferences. This poses entirely different obstacles to a global agreement. EICHENGREEN and UZAN in their analysis of the 1933 World Economic Conference in the context of the economic crisis, rightly remarked that a cooperative response could never be devised, when there was not even a shared diagnosis of the problem or a common conceptual framework. They correctly underlined the importance of recognising the existence of competing conceptual frameworks and domestic political constraints.⁶⁴⁵ The same applies to global competition law. A few decades later, in 1968, MARKERT similarly concluded that earlier attempts to establish an

⁶⁴⁰ T. Hale & D. Held, “Editors’ introduction: mapping changes in transnational governance” in T. Hale & D. Held (eds), *Handbook of transnational governance – institutions and innovations*, Cambridge, Polity Press, 2011, 20.

⁶⁴¹ Ibid., 21.

⁶⁴² A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 240-41.

⁶⁴³ Ibid., 242.

⁶⁴⁴ M. Gal, “Review Essay: New Perspectives on International Antitrust”, *The American Journal of International Law*, Vol. 106, 2012, 404.

⁶⁴⁵ B. Eichengreen & M. Uzan, “The 1933 World Economic Conference as an Instance of Failed International Cooperation”, Working Paper No. 90-149, October 1990, University of California at Berkeley, Department of Economics, 2, 36.

international antitrust system, for instance under the auspices of the United Nations or by the Council of Europe failed due to the contrast between the ambitious programs and the lack of agreement among the participating countries with regard to their attitudes concerning restraints of trade.⁶⁴⁶ Today the same conclusion could be reached, as there have not been any evolutions indicating that a multilateral consensus would be possible in the short to medium term. The question moreover is not limited to the feasibility of a global competition law, but to the desirability of it as well. The opening quote of this Part I by WOOD⁶⁴⁷ implies that competition law is indeed very closely intertwined with the environment it is developed in, and developed for, and that this environment is continually evolving, at different paces, in different places. A global set of rules is not able to address those different needs and concerns.

The default solution to the lack of global regulation of competition was the extraterritorial application of national laws, first according to the economic entity doctrine, and later following the implementation doctrine and the effects doctrine. Indeed, extraterritorial enforcement of national competition laws was not the first response to international restrictive business practices, and it is not ‘the natural and necessary’ way to deal with them.⁶⁴⁸ Despite many evolutions in the economic, political and legal field, the complexity of the international business environment today combined with the exponential increase in, and variation among competition laws, makes it difficult to let go of the current sovereignty-based system, which remains the basic mechanism for dealing with international competition.⁶⁴⁹ States are aware, however, that the unilateral application of their national laws is not only difficult and will often still require the help of the jurisdiction where the harmful activity takes place or the evidence is located, it also creates diplomatic problems as well as legal uncertainty, not to mention the fact that it may confront firms with conflicting remedies. Competition authorities, legislators, and subjects of the law therefore all suffer from this sub-optimal solution.

The disappointments in trying to create a multilateral agreement and the realisation that extraterritorial application of national rules leads to suboptimal outcomes resulted in a shift in preferences from binding multilateral harmonisation with supranational enforcement to soft multilateral convergence and bilateral enforcement cooperation. The irreconcilable interests of developed countries favouring non-legally binding codes including general equitable principles on the one hand, and developing countries preferring legally binding codes of conduct containing specific rules on the other hand, led to a prevalence of the former’s interests and a move towards the use of bilateral diplomatic approaches, rather than formalized international consultation and conciliation procedures.⁶⁵⁰ History therefore demonstrated how cooperation efforts can move along the four axes of cooperation mentioned earlier in this Part. This evolution did not proceed smoothly or efficiently, and did not occur in revolutionary leaps. Only gradually were countries able to adapt to a changing reality. Many different actors attempted to do the same thing (to develop a multilateral set of competition standards), revolving around the same principles and including much of the same ideas.

⁶⁴⁶ K. Markert, “Recent Developments in International Antitrust Cooperation”, *Antitrust Bulletin*, Vol. 13, 1968, 355.

⁶⁴⁷ “No matter how firmly someone may believe that the antitrust or competition law of a particular place has achieved final wisdom, history offers a strong message that some modesty is called for here.” D. Wood, “Is cooperation possible?”, Luncheon Speech, *New England Law Review*, Vol. 34, No. 1, 111.

⁶⁴⁸ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 19.

⁶⁴⁹ *Ibid.*, 55.

⁶⁵⁰ J. Davidow & L. Chiles, “The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct regarding Restrictive Business Practices”, *The American Journal of International Law*, Vol. 72, No. 2, 1978, 249, 268.

Only as experiences with competition law grew, did the complexities become more apparent. Alternative solutions were sought for and found in soft convergence and bilateral cooperation. The OECD was one of the first actors to issue non-binding guidelines. Those guidelines formed the basis for the early bilateral enforcement cooperation agreements.

PART II: an assessment of the EU's dedicated competition cooperation agreements

*“The basic prerequisite for any international cooperation in competition cases is the exchange of information and evidence between the national competition authorities. This lies at the centre of any efficient cooperation, and the level of its implementation may impede or enhance the activities of such authorities.”*⁶⁵¹

1. Benchmarks

This Part will analyse how and to what extent the EU's bilateral competition cooperation agreements tackle some of the problems revolving around effective international competition law enforcement, namely widely diverging substantive laws and underlying theories, jurisdictional disputes, availability of investigative tools, and more practical issues such as language barriers and timetables.⁶⁵² It will become clear whether these instruments, that are often considered an ‘interim-solution’ until the possibility of a global substantive agreement re-emerges, are more than that, or at least have the potential to be.

1.1 Introduction

As mentioned, dedicated competition cooperation agreements are agreements that exclusively focus on the modalities of enforcement cooperation between competition agencies. This study, which focuses on the EU, adheres to the typology employed by DG COMP, distinguishing between two generations of agreements.⁶⁵³ First generation agreements are centred around the comity principle. They provide for cooperation mechanisms such as notification, coordination, consultation, and exchange of information. Second generation agreements go beyond what is possible in first generation agreements, allowing the exchange of confidential information between the competition agencies of the contracting parties.⁶⁵⁴ The main limitation of first generation agreements is indeed that the exchange of information protected by confidentiality legislation is excluded,⁶⁵⁵ as first generation agreements generally foresee that no changes to existing laws should be made following

⁶⁵¹ M. Blachucki & S. Józwiak, “Exchange of information and evidence between competition authorities and entrepreneurs’ rights”, *Yearbook of Antitrust and Regulatory Studies*, Vol. 5, No. 6, 2012, 139.

⁶⁵² D. Wood, “Is cooperation possible?”, Luncheon Speech, *New England Law Review*, Vol. 34, No. 1, 107-108.

⁶⁵³ Others distinguish between three or even four generations of agreements. See for instance M. Taylor, *International Competition Law: a New Dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 108: “[...] bilateral competition agreements have undergone four distinct evolutionary phases over the past thirty years with each successive evolutionary phase involving a more sophisticated and ambitious form of bilateral co-operation:

(a) ‘passive co-operation’ agreements, from 1976 (‘First Generation Agreements’);

(b) ‘negative comity’ agreements, from 1988 (‘Second Generation Agreements’);

(c) ‘positive comity’ agreements, including international antitrust enforcement assistance agreements, from 1995 (‘Third Generation Agreements’);

(d) ‘extension of jurisdiction’ agreements, which remain rare (‘Fourth Generation Agreements’).”

The typology of DG COMP is selected because this study is written from an EU-law perspective, and the EU did not really participate in the ‘passive cooperation’ and ‘negative comity’ agreements mentioned above.

⁶⁵⁴ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 18.

⁶⁵⁵ Proposal for a Council Decision on the signing of an Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, COM/2012/0244 final - 2012/0126 (NLE), Explanatory Memorandum, June 2012, paragraph 1.

the agreement.⁶⁵⁶ In the US such agreements are sometimes described as antitrust-specific MLATs (see below, Part II, 2.4.2.3).⁶⁵⁷

The fact that the recent management plans of DG COMP (see above, introduction) indicated that the EU is no longer planning to invest in first generation agreements, might suggest that an assessment of such agreements is no longer useful. It is nevertheless interesting to find out, and therefore also the purpose of this assessment, why these agreements are being phased-out, and whether this decision is justified. Moreover, it is likely that the content of the provisions will survive in other types of agreements, such as MoUs, second generation agreements, or recommendations, justifying continued study. The assessment adheres to a functionalist approach towards international competition cooperation. Central in this approach is an evolutionary logic, whereby “[i]nstitutions that are well adapted to their socio-economic setting will survive and replicate, while institutions that do not match their settings must adapt or perish.”⁶⁵⁸ Changes in the nature of political or economic problems will then dictate the shape of institutional arrangements.⁶⁵⁹ Scrutiny of second generation agreements is relevant because of the rarity and novelty of the agreements. As the EU is planning to conclude more second generation agreements, it is important to analyse from the start whether these agreements fulfil their potential and whether and where there is room for improvement.

1.2 Methodology for the determination of the benchmarks

Generally, indicators to assess the impact or success of an international agreement would include legislative changes, the development of political agendas, public discourse, or actor strategies, but this is difficult to measure when it comes to enforcement cooperation agreements. First, available data are limited (see above, introduction) and even where data are available, the number of cooperation instances reveals little about the quality of cooperation. It is moreover impossible to develop counterfactuals, in other words, there are no data on the road not taken. It is extremely difficult to determine what would have happened if certain authorities would or would not have cooperated at a certain stage in the investigation. Second, public discourse does not necessarily reflect true success, and finally, and most importantly, causality is difficult to determine, as a host of competing factors and explanations for progress or lack thereof would have to be disentangled.⁶⁶⁰ However, while the evaluation or assessment of an international agreement is certainly difficult, the task of seeking to measure whether competition cooperation agreements are furthering their goals is a valuable one and one worth pursuing. This study will therefore focus on the content of the provisions in the agreement, where possible illustrated with practical examples of their application, rather than exclusively focussing on the implementation of the agreements. The quality and nature of the tools offered to the agencies will be assessed.

⁶⁵⁶ For a detailed overview of the provisions of first generation agreements, see V. Demedts, “International Competition law enforcement: different means, one goal?”, *Competition Law Review*, Vol. 8, No. 3, 2012, 223-253.

⁶⁵⁷ M. Chowdhury, “From Paper Promises to Concrete Commitments: Dismantling the Obstacles to Transatlantic Cooperation in Cartel Enforcement”, American Antitrust Institute Working Paper No. 11-09, 28 November 2011, 9.

⁶⁵⁸ T. Hale & D. Held, “Editors’ introduction: mapping changes in transnational governance” in T. Hale & D. Held (eds), *Handbook of transnational governance – institutions and innovations*, Cambridge, Polity Press, 2011, 19.

⁶⁵⁹ *Ibid.*, 18.

⁶⁶⁰ S. Weber Waller, “The next generation of global competition law” in N. Charbit, E. Ramundo, A. Chehtova, & A. Slater (eds), *William E. Kovacic An Antitrust Tribute, Liber Amicorum – Volume I*, New York, Institute of Competition Law, 2012, 99.

An analysis of the added value of dedicated competition agreements necessarily depends on the standards they are measured against. The conclusion of competition cooperation agreements can be motivated by a diversity of factors, which means that diverse criteria can be used to assess the effectiveness of the cooperation. The agreements themselves have remained quite vague with regard to their pursuits (see below, Part I, 1.3), and the ones concluding the agreements have not been very explicit about their reasons to choose such a legal instrument. In what follows, measurable benchmarks modelled on the potential benefits of agreements are listed and categorised. These benchmarks will be used further in this study for the assessment of the content of the first and second generation agreements concluded by the EU with third countries. It will be systematically analysed whether and to what extent the EU's cooperation agreements have contributed to the attainment of such benefits.

The categories listed below were developed in the framework of this study to represent a more far-going breakdown of the distinct benefits of (case-specific) cooperation. This breakdown is necessary to arrive at more measurable and testable benchmarks that go beyond vague generalities. The categories are the result of an accumulation of different sources. The first main source from which the information in the following section is drawn is the stocktaking exercise under the auspices of the ICN. This exercise was finalised in 2007 and dealt with cooperation between competition agencies in cartel investigations (although many of the results are valid for merger cooperation and cooperation on unilateral conduct as well), a project on which DG COMP volunteered to take the lead.⁶⁶¹ Second, the stocktaking exercise of the OECD Competition Committee's work, issued in 2012 and stretching over 20 years,⁶⁶² as well as other OECD documents such as the work carried out in the framework of the Global Forum on Competition in 2012 concerned with improving international cooperation in cartel investigations.⁶⁶³ Also the paper of TEMPLE LANG regarding enhanced enforcement cooperation was used as inspiration.⁶⁶⁴ Finally, an important source of information are the results of the OECD/ICN Joint Survey on international enforcement cooperation.⁶⁶⁵ To assess the legal instrument as such, apart from its content, use will be made of the benefits of 'soft law', mentioned above (see above, Part I, 2.4.4) to determine whether the level of legalization of the agreements is appropriate.

1.3 Measurable benchmarks

A state will mainly conclude a competition cooperation agreement to be able to better address the international anticompetitive behaviour affecting its territory by improving enforcement. The main beneficiaries of early first generation agreements, however, were those subject to scrutiny, in other words those involved in antitrust proceedings, as the main goal was to diminish the risk of conflicting outcomes. Other obvious beneficiaries are the competition agencies concluding the agreement, which will (or should) benefit from more streamlined procedures. Lastly, it are the

⁶⁶¹ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 5.

⁶⁶² OECD, International Co-operation – Stocktaking Exercise of the Competition Committee's Past Work, DAF/COMP/WP3(2012)5, 12 June 2012.

⁶⁶³ Again, the results can generally be transposed to merger investigations and unilateral conduct cases. OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Background Note, DAF/COMP/GF(2012)6, 13 February 2012.

⁶⁶⁴ OECD, Hearing on Enhanced Enforcement Cooperation, Paper by John Temple Lang, "Aims of enhanced international cooperation in competition cases", DAF/COMP/WP3(2014)7, 28 May 2014, 2-3.

⁶⁶⁵ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013.

consumers and other market players affected by anticompetitive conduct that will profit from better enforcement.

When assessing the worth of the EU's first generation competition agreements, it is important to first determine what can be achieved by such agreements and what is out of reach. In other words: what are the goals of the agreement and what are not. The first generation agreements under scrutiny in this study remain quite vague in determining their objectives. In the 1991 EU-US Agreement for example, the preamble acknowledges that cooperation would enhance the sound and effective enforcement of the parties' competition laws. Article I.1 adds that "[t]he purpose of the agreement is to promote cooperation and coordination and lessen the possibility or impact of differences between the Parties in the application of their competition laws." The goal of the agreement is mainly described negatively as conflict-avoidance. If this is compared to more recent first generation agreements such as the 2003 EU-Japan or the 2009 EU-Korea agreements, there is a slight change of tone. Both agreements state in their articles I.1 that "[t]he purpose of this Agreement is to contribute to the effective enforcement of the competition laws of each Party through promoting cooperation and coordination between the competition authorities of the Parties and to avoid or lessen the possibility of conflicts between the Parties in all matters pertaining to the application of the competition laws of each Party." The purpose is therefore somewhat broadened, focussing not only on conflict avoidance but also more generally on contributing to effective enforcement. Even though the content has remained more or less the same, the way in which the Agreement is applied has somewhat changed.

WAYLAND categorised the principal purposes of international cooperation into three groups: a larger understanding of the competitive process, greater effectiveness of competition enforcement activities, and an increased efficiency of the overall global enforcement effort with the aim of facilitating and promoting economic activity to the advantage of consumers.⁶⁶⁶ GERBER equally deconstructed the scissors paradox mentioned above (see above, Part I, 1.1.2) into three components. These components can be seen to represent three important obstacles to effective international competition law enforcement. For the purpose of this study they can be translated into categories of benefits that international cooperation in general (not restricted to case-cooperation) can bring to remedy these obstructions. A first component of the scissors paradox is that deterrence is undermined. This can be mitigated by strengthening enforcement, via increased awareness/detection of infringements or better access to evidence. A second aspect is the increased potential for jurisdictional conflicts, both in likelihood and scope. While a choice-of-law rule is too far-going for most jurisdictions because it is too intrusive, there are other solutions to mitigate the consequences of such conflicts. Coordination of remedies will be of great importance for the competitive process. Greater understanding of the processes (be it the language and/or content of the procedural and substantive rules) leading to foreign decisions might moreover lead to greater acceptance of divergent outcomes. In other instances the use of comity might lead one jurisdiction to defer to another. Finally, GERBER identifies risk, uncertainty, inconsistency and compliance costs as the final component of the scissors paradox. The answer here is to create a more predictable and consistent legal environment. While this will not be possible on all fronts, some minimum harmonization of procedural rules could significantly improve the situation.⁶⁶⁷ While highly relevant, these are not exactly measurable benefits of the cooperation that the agreements aim to promote.

⁶⁶⁶ J. Wayland, "International cooperation at the antitrust division", remarks as prepared for the International Bar Association's 16th Annual Competition Conference, Florence, 14 September 2012, 2.

⁶⁶⁷ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 92, 94.

The abovementioned objectives should therefore, as mentioned, be further broken down in smaller, measurable units.

Bilateral dedicated competition agreements are obviously characterised by some inherent limitations. First, the existence of substantive conflicts in multijurisdictional competition cases is primarily caused by different traditions of competition policy and divergent competition, industrial, or other policy goals.⁶⁶⁸ Enforcement cooperation via first generation bilateral agreements cannot overcome such problems and does not aim to do so. It can, however, foster greater understanding of different competition systems and can encourage competition authorities to take into account considerations of other competition authorities. While cooperation agreements do not address substantial divergence of analysis, they do allow for the coordination of responses to anticompetitive behaviour.⁶⁶⁹ Second, bilateral agreements are not adequate in themselves for cases in which more than two jurisdictions are involved, for instance multijurisdictional merger cases that require multiple notifications.⁶⁷⁰ Even though it could be claimed that several bilateral arrangements would result in an entanglement of differing coordination requirements, coordination among some countries of information requirements or timelines would already be a significant improvement for the companies involved.

1.2.1 Limitation of negative externalities: conflict avoidance

As mentioned, the main goal of early cooperation agreements was to reduce the risk negative externalities such as divergent or conflicting decisions and remedies. International cooperation can serve as an interface between competition agencies and different legal systems. Certain behaviour may enhance global welfare, but severely affect the national welfare of a particular country, causing the country to nonetheless prohibit the actions. Legislative and enforcement choices are thus determined by whose welfare should be promoted. This, in part, explains the continuing disagreement on what constitutes an ‘optimal’ antitrust policy.⁶⁷¹ A typical example of the nationally-oriented mind-set of the competition authorities the lax regulation and enforcement of export cartels, especially compared to domestic cartels.⁶⁷² Even if a nation’s competition laws are formulated in a neutral way, its policy choices or enforcement practice may be biased and rather ‘inward-focused’. This explains why even similar substantive laws may result in conflicting outcomes when multiple authorities are investigating the same case. According to the Antitrust Modernization Commission (AMC) (see below, Part II, 2.5.2.2) there is a large cost connected to inconsistent

⁶⁶⁸ M. Blauburger, “The Governance of Overlapping Jurisdictions. How International Cooperation Enhances the Autonomy of Competition Authorities”, Transtate Working Papers, No. 102, Bremen, 2009, 1.

⁶⁶⁹ Also see A. Schaub, “International Co-operation in Antitrust matters: making the point in the wake of the Boeing/MDD proceedings”, *Competition Policy Newsletter*, No. 1, 1998, 2-6.

⁶⁷⁰ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 91.

⁶⁷¹ A. Klevorick & A. Sykes, “United States Courts and the Optimal Deterrence of International Cartels: a Welfarist Perspective on Empagran” in E. Fox & D. Crane (eds), *Antitrust stories*, New York, Foundation Press, 2007, 377-378.

⁶⁷² H. Klodt, *Towards a Global Competition Order*, Berlin, Liberal Verlag GmbH, 2005, 71-72. Export cartels created by or involving US firms, for instance, are exempted from US antitrust laws by the Webb-Pomerene Act, (15 USC §§ 61-66 (2000)) as long as the conduct in question does not have adverse effects on US consumers. (A. Klevorick & A. Sykes, “United States Courts and the Optimal Deterrence of International Cartels: a Welfarist Perspective on Empagran” in E. Fox & D. Crane (eds), *Antitrust stories*, New York, Foundation Press, 2007, 379.) Export cartels may create artificial product scarcity on domestic markets or may directly or incidentally limit imports within the domestic territory. (E. Elhauge & D. Geradin, *Global Competition Law and Economics*, 2nd ed., Oxford and Portland Oregon, Hart Publishing, 2011, 1193).

remedies, significantly obstructing innovation as well as global trade and investment, creating an atmosphere of uncertainty and political tension.⁶⁷³

Some scholars claim that actual damage suffered by companies due to conflicting antitrust decisions is very rare.⁶⁷⁴ Explicit conflict, however, is only a small part of the negative effects that the applicability of multiple national laws on one case may have. The above type of conflicts may also create political tension and lead to conflict between authorities or states. While the impact of cooperation agreements here is difficult to measure, the past has already proven that first generation agreements are unable to entirely stop political conflicts from emerging. Proof hereof are the infamous *GE/Honeywell* and *Boeing/McDonnell Douglas* cases (see above, Part I, 2.2.5). In the OECD Report on Positive Comity it was illustrated that resentment over jurisdictional disputes can be an obstacle to cooperation. It was observed by one enforcement official that, despite the exceptionality of actual jurisdictional conflicts, “*jurisdictional differences between the United Kingdom and the United States have significantly limited the co-operation between their competition authorities.*”⁶⁷⁵ The potential hindrance to international enforcement cooperation may therefore be larger than appears at first.

The main way in which conflict avoidance can be achieved is by ensuring that authorities investigating the same case remain in close dialogue from the early start of the investigation process, taking into account externalities of their actions, and by aligning the timing of the procedures to the biggest extent possible within the respective legal frameworks, in particular deadlines and decision-making moments. Differing substantive laws entail that conflicting remedies can never be entirely eliminated, but close cooperation can limit the damage.

Not all negative externalities can and should be avoided. Some differences between the competition systems of jurisdictions are related to capacities of antitrust authorities, stages of economic development, different impacts of the same transaction or conduct in different markets or different facts. Cooperation agreements cannot and should not attempt to remedy this type of divergences. When different outcomes are related however to for instance a lack of knowledge or perspective of less-experienced agencies, or would stem from divergences such as the earliest allowable date of premerger notification, this can and should be addressed.⁶⁷⁶

1.2.2 Rationalisation of resources

Globalisation resulted in an increased workload for agencies that have not necessarily gotten the equivalent budget-increases over the past years. Studies indicated that international cartels may escape prosecution due to resource constraints of enforcement agencies.⁶⁷⁷ Rationalisation of

⁶⁷³ D. Garza, J. Yarowsky, B. Burchfield, W. S. Cannon, D. Carlton, M. Delrahim, J. Jacobson, D. Kempf, Jr., S. Litvack, J. Shenefield, D. Valentine, J. Warden, *Antitrust Modernization Commission - Report and Recommendations*, April 2007, available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (accessed May 2015), 222.

⁶⁷⁴ X., Contribution of Randolph W. Trittel in Summary of Antitrust Modernization Commission Hearing - International Antitrust Issues, 15 February 2006, http://www.americanbar.org/content/dam/aba/migrated/antitrust/at-links/pdf/at-mod/02_15_06.authcheckdam.pdf, 3.

⁶⁷⁵ OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through ‘Positive Comity’ in Competition Law Enforcement, DAF/CLP(99)19, 14 June 1999, 4.

⁶⁷⁶ E. Fox, “Antitrust without borders: from roots to codes to networks”, E15 Initiative. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 2015, 1.

⁶⁷⁷ See M. Gal, “Antitrust in a globalized economy: the unique enforcement challenges faced by small and developing jurisdictions”, *Fordham International Law Journal*, Vol. 33, No. 1, 2009, as mentioned in M. Gal, “Review Essay: New Perspectives on International Antitrust”, *The American Journal of International Law*, Vol. 106, 2012, 410.

resources is therefore a necessity. A major benefit of successful international cooperation is that it can result in a more efficient use of agency resources and in general reduce the cost of enforcement. If competition agencies cooperate, there will be less duplicative efforts and less misallocation of resources.⁶⁷⁸ Resources can be rationalised via deference, or other forms of cooperation such as exchange of information which would for instance make evidence-gathering easier. If agencies can cooperate beyond their jurisdiction, evidence can be transmitted, instead of having to resort to expensive discovery techniques.

Of course cooperation itself comes at a cost as well. Cooperation will require human resources, and will at times imply an increased administrative burden (communicating and coordinating, translation costs,...).⁶⁷⁹ Many competition authorities claim that there are insufficient resources available to address requests for assistance.⁶⁸⁰ This problem is acute for both younger, less experienced competition authorities as more established ones. The former need time to gain credibility as an enforcer and need to develop the necessary tools and policies to achieve that aim. It is difficult then to direct the little resources they have towards foreign assistance.⁶⁸¹ The latter may be flooded with requests from smaller jurisdictions and face difficulties as well. In the 1998 OECD Cartel Recommendation it is explicitly foreseen that resource constraints form a legitimate reason to deny a request for assistance.⁶⁸² Authorities and governments should however pay attention that the costs involved in cooperating do not outweigh the costs of non-cooperation.

1.2.3 An increase in the efficiency and effectiveness of the investigation

Another potential benefit of case-cooperation is that enforcement can take place more effectively and more efficiently. These gains can take place on two levels: prior to the investigation, and during the investigation. It starts with raising awareness *prior* to any case. One reason for under-enforcement is the fact that a competition agency may simply not be aware of an infringement. If competition agencies cooperate and notify each other about possible infringements, or (im)pending cases they are dealing with that could potentially harm the other party's important interests, information will more easily and more timely find its way to the relevant authorities. Even though it is easier for agencies to hear about potentially anticompetitive behaviour in this internet- and media-age than before, it is possible that agencies are not aware of parallel investigations taking place in other jurisdictions. The level of enforcement may in this manner be increased via cooperation.

Cooperation can also increase the effectiveness and efficiency of competition investigations once they have started. The main obstacle for more advanced international enforcement is the limited legal ability of competition authorities to exchange information, and in particular confidential

⁶⁷⁸ X., Contribution of James R. Atwood in Summary of Antitrust Modernization Commission Hearing - International Antitrust Issues, 15 February 2006, http://www.americanbar.org/content/dam/aba/migrated/antitrust/at-links/pdf/at-mod/02_15_06.authcheckdam.pdf (accessed September 2015), 1.

⁶⁷⁹ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 57.

⁶⁸⁰ In the OECD/ICN Joint Survey, 45% of respondents identified resource constraints as a cost of international cooperation. Resource constraints were most commonly mentioned as disadvantages of cooperation. OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 30, 57.

⁶⁸¹ OECD, Issues paper by the secretariat, Limitations and constraints to international co-operation, DAF/COMP/WP3(2012)8, 23 October 2012, 12.

⁶⁸² OECD, International Co-operation – Stocktaking Exercise of the Competition Committee's Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 28.

information.⁶⁸³ Already in 1999, in the Draft Plans for a Report to the Council Concerning Hard Core Cartels, the OECD Competition Committee identified legal restrictions on international information exchange among competition authorities as major obstacles to effective cooperation. This concerned both confidential as well as non-confidential information, even in the presence of proper safeguards and when the exchange would benefit both parties.⁶⁸⁴ If the legal framework is considered weak, the relevant procedures are not sufficiently transparent, or if the safeguards for due process are considered insufficient, countries will rightly be reluctant to cooperate.⁶⁸⁵ Information and evidence are crucial throughout competition cases. Coordination and information exchange can increase the speed of an investigation, and can provide greater access to evidence. This could be done by coordinating dawn raids or other investigatory measures, thereby maximising the element of surprise and avoiding the destruction of evidence. Evidence may also be unavailable because it is situated in another jurisdiction, this situation could be addressed via exchange of information.⁶⁸⁶

Another benefit of international cooperation related to more effective enforcement is that via cooperation the risk of forum hopping or forum shopping is diminished. Divergent approaches, where one jurisdiction does not take into account another jurisdiction's interests, would encourage forum shopping in the form of firms lodging complaints there where they can best expose their competitors, or strategic leniency applications, for example. This represents a standard prisoner's dilemma involving two prisoners, in separate rooms, unable to communicate with each other. If both prisoners do not say anything, the sheriff can only give them a fine. If one prisoner confesses, he is granted leniency, but the other one will be incarcerated for ten years. If both confess, each prisoner will be incarcerated for five years. In the context of international competition law, this translates into the fact that each firm wishes strict (antitrust) control for other firms, yet no, or more lax restrictions for itself.⁶⁸⁷ Cooperation among competition agencies will allow those agencies to control this process to a certain extent, resulting in more thorough and effective enforcement.⁶⁸⁸ Increased contact between enforcement officials may also lead to increased levels of expertise, thereby improving the overall quality of enforcement.

1.2.4 An increase in transparency and legal certainty

Concluding a cooperation agreement can also increase transparency and linked to this, legal certainty for both other agencies as well as those subject to a competition investigation. This can be done by stating clear goals, and describing clear procedures that safeguard the procedural rights of the parties. This implies a certain level of precision. Vague generalities offer no added value to what would otherwise be mere practice. When cooperation agreements are explicit and precise, other agencies

⁶⁸³ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 100, 112. Also see OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 309.

⁶⁸⁴ OECD, International Co-operation – Stocktaking Exercise of the Competition Committee's Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 28.

⁶⁸⁵ OECD, Issues paper by the secretariat, Limitations and constraints to international co-operation, DAF/COMP/WP3(2012)8, 23 October 2012, 14.

⁶⁸⁶ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 7.

⁶⁸⁷ X., Contribution of James R. Atwood in Summary of Antitrust Modernization Commission Hearing - International Antitrust Issues, 15 February 2006, http://www.americanbar.org/content/dam/aba/migrated/antitrust/at-links/pdf/at-mod/02_15_06.authcheckdam.pdf (accessed September 2015), 1.

⁶⁸⁸ M. Blauburger, "The Governance of Overlapping Jurisdictions. How International Cooperation Enhances the Autonomy of Competition Authorities", Transtate Working Papers, No. 102, Bremen, 2009, 18.

can observe the agreements concluded and take away their own lessons from it, while those involved in a merger for instance can anticipate on the process and aid it even further. International cooperation between competition agencies increases the predictability of the legal environment in which companies act. This can happen via coordination of procedures or consultations regarding remedies to avoid incompatibility.⁶⁸⁹ Divergence in antitrust laws creates uncertainty about the legal consequences of certain cross-border transactions. More legal certainty, in particular with regard to procedure, will be an incentive for companies to innovate and engage in pro-competitive activities.⁶⁹⁰

1.2.5 Overcoming practical issues

An agreement focusing on case-cooperation offers the opportunity to overcome practical issues that may hinder the international enforcement process. A common hurdle in coordinating investigations is the language barrier.⁶⁹¹ It is thereby not only the language itself that can be problematic, but the terminology or jargon as well. Competition law is a technical and fast-evolving branch of law, and the terminology follows suit. Not every competition authority may be familiar with new or developing terms.⁶⁹² GERBER called competition law an ‘unusual’ form of law as it aims to protect the integrity of a process (the competitive process), and employs an often unfamiliar and imprecise terminology. He warned for the hazards of cross-border communication, and mentioned as an added difficulty the complexity of the concepts themselves, inter alia because they involve an intertwining of economic, legal and procedural components. This makes it challenging for those inside the system to communicate effectively and efficiently, and opaque for outside observers.⁶⁹³ Cooperation can help overcome some of these problems as authorities learn from each other or agree on a shared terminology. Clear definitions are of utmost importance.

What will likely remain a difficult issue is cooperation between authorities from different time zones.⁶⁹⁴ While working in different time zones cannot entirely be overcome via an agreement, as mentioned, decision making moments can be aligned within the room offered by the parties’ procedures. Finally, the question who should pay for certain acts of cooperation can be regulated as well.

1.2.6 Decreased burden for companies

Competition agencies are not the only ones benefitting from international cooperation between competition agencies. Cooperation could help companies save both time and expenses by significantly reducing the (procedural) burden and costs for the companies involved, be it to a lesser extent than a multilateral agreement would. For instance, if a merger has to be notified to a handful

⁶⁸⁹ H. Dieckmann, “The Benefits of Cooperation between Competition Authorities”, Inaugural Symposium of the Competition Policy Research Center, Tokyo, 2003, 1, at <http://www.jftc.go.jp/cprc/DP/CPDP-9-E.pdf> (accessed December 2011).

⁶⁹⁰ X., Contribution of James R. Atwood in Summary of Antitrust Modernization Commission Hearing - International Antitrust Issues, 15 February 2006, http://www.americanbar.org/content/dam/aba/migrated/antitrust/at-links/pdf/at-mod/02_15_06.authcheckdam.pdf (accessed September 2015), 1.

⁶⁹¹ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 45.

⁶⁹² OECD, Issues paper by the secretariat, Limitations and constraints to international co-operation, DAF/COMP/WP3(2012)8, 23 October 2012, 12.

⁶⁹³ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 93.

⁶⁹⁴ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 30.

or more competition authorities, this involves high transaction costs in the form of having to comply with different procedures, information requirements and deadlines, resulting in high fees of lawyers, economists, accountants or others.⁶⁹⁵ To successfully engage in a multijurisdictional merger, parties indeed require the assistance of international law firms to analyse the merger, prepare the necessary notifications, and they often need to cooperate with local counsel in each separate jurisdiction.⁶⁹⁶ Cooperation could alleviate this burden by aligning deadlines and other requirements.

1.2.7 Discipline

Finally, a cooperation agreement can install a certain discipline in the cooperation process. A clear structure to cooperate, with clear boundaries and safeguards, as well as a clear commitment to a close working relationship, can provide strong incentives for parties to systematically consider and execute acts of cooperation. Not only the legal form of the agreement will play a role here, but also the type of obligations within it.

1.4 Benefits not measured in the framework of the study

The abovementioned benchmarks are based on benefits of agreements revolving around case-cooperation that can be measured within the framework of this study. There are broader benefits as well, but these require more intense empirical research, which falls outside the scope of this study. These benefits are mentioned below for the purpose of comprehensiveness.

1.4.1 Enhanced autonomy and authority

An independent competition authority is central in a solid competition law system. An effect of international cooperation that is particularly beneficial for younger or less established competition agencies is that it can – at first sight perhaps paradoxically – enhance their autonomy *vis-à-vis* politics, the judiciary, and the business world. When different national competition authorities come to conflicting outcomes in a certain case, they become susceptible to external influences. Indeed, it creates an opportunity for governments to intervene, for firms to engage in forum-shopping, and for judges to decide in cases of conflict.⁶⁹⁷ If agencies cooperate however, and their decisions are consistent with those of other authorities, this confers greater authority to the decisions and will make the competition authorities less institutionally dependent.

Independence from politics can be interpreted in many ways. First, a competition policy or procedure that is supported internationally, has a stronger case against interference by other policies,

⁶⁹⁵ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 94. A 2003 survey by PricewaterhouseCoopers showed that in multijurisdictional merger reviews these costs could run up to 3.8 million USD for ‘uncomplicated’ mergers and 11.5 million USD for ‘more complex ones’. D. Garza, J. Yarowsky, B. Burchfield, W. S. Cannon, D. Carlton, M. Delrahim, J. Jacobson, D. Kempf, Jr., S. Litvack, J. Shenefield, D. Valentine, J. Warden, *Antitrust Modernization Commission - Report and Recommendations*, April 2007, available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (accessed May 2015), 217.

⁶⁹⁶ D. Klawiter & C. Laciak, “International Competition Cooperation: No Longer Just the Formal Agreements”, *The Antitrust Review of the Americas, A Global Competition Review Special Report*, 2003, 25.

⁶⁹⁷ M. Blauburger, “The Governance of Overlapping Jurisdictions. How International Cooperation Enhances the Autonomy of Competition Authorities”, *Transtate Working Papers*, No. 102, Bremen, 2009, 1. Also see F. Jenny, “Competition authorities: independence and advocacy” in D. D. Sokol & I. Lianos (eds), *The Global Limits of Competition Law*, Stanford University Press, Stanford, 2012, 158-176.

or politicization by the government. International support makes competition authorities institutionally more independent, allowing them to protect competition policy from being overly influenced by other policy goals.⁶⁹⁸ International cooperation can thus be seen as a type of defence mechanism from ‘attacks’ at national level. Secondly, also interest groups might have less power in an international setting than in a national setting.⁶⁹⁹ It has been demonstrated by empirical research that industrial policy objectives negatively affecting macroeconomic growth pursued by national governments are often included under pressure of private stakeholders, especially under the weight of elections. Firms publicly pressuring competition authorities will have less power when the authority has the support of its international colleagues.⁷⁰⁰ Governments may also find it easier to resist to such pressure if they can refer to ‘pressure from above’ or ‘international obligations’.⁷⁰¹ Autonomy from the judiciary results from the fact that cooperation renders questions of jurisdictional overlap and the limits of extraterritoriality less frequent and less salient.⁷⁰²

MATEUS claimed that the reputation of a competition authority has a strong influence on enforcement and deterrence, and it plays a role on several distinct moments in the enforcement process.⁷⁰³ Of course the narrative is circular: if an agency has a good reputation, it will likely be more involved in cooperation processes, which in turn will again strengthen its standing. The reputational effect alone may then lead to increased deterrence and compliance. International cooperation can increase the legitimacy and authority of competition law enforcement. If different agencies investigating the same case work together and reach the same conclusion while imposing non-conflicting remedies, parties and the public will be less tempted to question the soundness of the national competition policy.⁷⁰⁴ Cooperation may be a way to grant more visibility to the usefulness of the work of competition agencies, and a way to potentially obtain larger budget allocations.

1.4.2 Stimulate a learning effect and generate trust

Another significant benefit of international cooperation between competition agencies is the learning effect it can create. This learning effect is threefold. First, analysis of individual cases might be facilitated via discussions among competition authorities on the methods used in a particular case.⁷⁰⁵ This may relate to theoretical analysis, or particular enforcement actions.⁷⁰⁶ Second, frequently interacting with other competition authorities fosters a greater understanding of not only the different laws that apply, but also of the functioning of the foreign agency. Cooperation can

⁶⁹⁸ M. Blauburger, “The Governance of Overlapping Jurisdictions. How International Cooperation Enhances the Autonomy of Competition Authorities”, Transtate Working Papers, No. 102, Bremen, 2009, 1, 11-14.

⁶⁹⁹ M. Gal, “Review Essay: New Perspectives on International Antitrust”, *The American Journal of International Law*, Vol. 106, 2012, 409.

⁷⁰⁰ M. Blauburger, “The Governance of Overlapping Jurisdictions. How International Cooperation Enhances the Autonomy of Competition Authorities”, Transtate Working Papers, No. 102, Bremen, 2009, 17.

⁷⁰¹ H. Klodt, *Towards a Global Competition Order*, Berlin, Liberal Verlag GmbH, 2005, 78.

⁷⁰² M. Blauburger, “The Governance of Overlapping Jurisdictions. How International Cooperation Enhances the Autonomy of Competition Authorities”, Transtate Working Papers, No. 102, Bremen, 2009, 16.

⁷⁰³ A. Mateus, “Ensuring a More Level Playing Field in Competition Enforcement Throughout the European Union”, *Competition Law Review*, Vol. 31, No. 12, 2010, 524.

⁷⁰⁴ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 83.

⁷⁰⁵ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 7.

⁷⁰⁶ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 25-26.

therefore lead to a broader learning effect beyond a certain case, and can therefore also be relevant to cases that do not have a transnational character. Even if agencies are not working on the same case, they can still benefit from each other's experience. An agency can share relevant experience with a certain market or a certain type of behaviour with another agency faced with the matter that has less knowledge about it.⁷⁰⁷ In today's world, rapid technological and institutional changes often create new challenges for competition authorities, such as unstable market definitions. This benefits the companies operating in these markets as well, as competition authorities will be able to make better informed decisions. Regular interaction may over time lead to convergence in the economic and legal analysis of competition cases due to a greater understanding of different competition systems. By stimulating consistent contact between different competition authorities, a close working relationship and mutual confidence in each other's capabilities is encouraged.⁷⁰⁸ This can play an important role in generating deeper cooperation in the future.⁷⁰⁹ Finally, the learning process relates to the cooperation itself as well. Via repeat interaction, competition authorities will learn to handle difficulties in the coordination of investigations, in dealing with different legal systems, different time-schedules, different priorities, different languages, and shortcomings in the internal organisation of competition authorities.⁷¹⁰ They will understand each other better, and be able to fine-tune the cooperation process.

1.4.3 Catalyst for further cooperation and convergence

Bilateral cooperation agreements may function as a catalyst for cooperation and convergence. While they might not create cooperation where there was none previously, as partner signatories are carefully selected *before* entering into an agreement, once the agreement is in place, cooperation does seem to become a more structural part of the daily enforcement culture. Parties that have concluded a formal cooperation agreement will often engage in informal cooperation as well.⁷¹¹ It is therefore not true that first generation agreements merely amount to a public statement expressing the willingness of the signatories to enforce competition laws.⁷¹²

The role as catalyst for cooperation contributes to the stepping stone-theory in a certain way. Bilateral competition cooperation agreements can pave the way for more advanced cooperation techniques. MELAMED, former US Assistant Attorney General of the DoJ Antitrust Division, confirmed that bilateral cooperation enables antitrust agencies to learn and therefore allows them to tackle specific enforcement problems more effectively and efficiently, but moreover improves the

⁷⁰⁷ H. Dieckmann, "The Benefits of Cooperation between Competition Authorities", Inaugural Symposium of the Competition Policy Research Center, Tokyo, 2003, at <http://www.jftc.go.jp/cprc/DP/CPDP-9-E.pdf> (accessed December 2011), 1.

⁷⁰⁸ F. Jenny, "International Cooperation on Competition: Myth, Reality and Perspective", *The Antitrust Bulletin*, Vol. 48, Winter 2003, 981-983, and H. Dieckmann, "The Benefits of Cooperation between Competition Authorities", Inaugural Symposium of the Competition Policy Research Center, Tokyo, 2003, 1, at <http://www.jftc.go.jp/cprc/DP/CPDP-9-E.pdf>, (accessed December 2011), 5.

⁷⁰⁹ GAL has looked into the relationships between different forms of cooperation agreements, and how they can serve as catalysts: M. Gal, "International Antitrust Solutions: Discrete Steps or Causally Linked?" in J. Drexler, W. Grimes, C. Jones, R. Peritz, & E. Swaine (eds), *More Common Ground for International Competition Law?*, Cheltenham, Edward Elgar Publishing, 2011.

⁷¹⁰ P. Lowe, "International Cooperation between Competition Agencies: Achievements and Challenges", 4th Seoul International Competition Forum, 5 September 2006, 4.

⁷¹¹ F. Jenny, "International Cooperation on Competition: Myth, Reality and Perspective", *The Antitrust Bulletin*, Vol. 48, Winter 2003, 991-992.

⁷¹² D. Wood, "Is cooperation possible?", Luncheon Speech, *New England Law Review*, Vol. 34, No. 1, 110.

bilateral relationship itself. As parties become more comfortable with each other and gain a better understanding of the issues and interests involved, agreements containing simpler obligations evolve into more complex arrangements. In this manner the US' 1984 cooperation agreement with Canada led the way to their 1995 agreement, the US' 1982 agreement with Australia helped to build the confidence necessary for the mutual assistance agreement between the two parties, and the 1991 EU-US Agreement spawned the 1998 Positive Comity Agreement. Bilateral agreements, while lacking strong legal effect, have strengthened trust between parties and thereby laid a foundation for sound, day-to-day enforcement relationships.⁷¹³ Generally, personal relations play an important role in fostering the necessary trust to engage in cooperation.⁷¹⁴ When this type of relationships is not available, however, formal agreements can play a facilitating role by demonstrating the willingness of both parties to engage themselves, and by laying down clear rules.

2. First generation agreements: a costly way to create and maintain momentum

Cooperation between competition authorities is quite a young phenomenon. Klawiter and Laciak mention the following anecdote in 2003: *"At a recent conference, an official was asked how today's ECUS cooperation differs from the level of cooperation five years ago. After beginning to answer, the official abruptly paused and responded: 'Five years ago we weren't even speaking to each other!'"*⁷¹⁵ This demonstrates both the fast pace in which international cooperation on competition matters has evolved, as well as the fact that during the late nineties, indeed, after the entry into force of the EU-US first generation competition cooperation agreement, cooperation was not going as smoothly as hoped.

Following the benchmarks identified above, this part will assess the performance of the first and second generation agreements concluded by the EU with third countries. Based on this assessment, suggestions for improvement will be offered, drawing from experience in both competition policy and other policy fields. For both first and second generation agreements, the context in which they were concluded, their content, meaning the cooperation mechanisms offered, the legal nature of the agreements, and their use will be discussed.

2.1 Context of conclusion of the EU-US Agreement

The EU has concluded four bilateral first generation competition cooperation agreements, more precisely with the US in 1991 (complemented by a specific agreement on positive comity in 1998, an administrative arrangement on attendance in 1999, as well as Guidelines on Cooperation in Merger Investigations in 2002, renewed in 2011), with Canada in 1999, with Japan in 2003, and with the Republic of Korea in 2009.⁷¹⁶ This study will be based on the EU-US cooperation Agreement, as

⁷¹³ A. Melamed, "International Cooperation in Competition Law and Policy: What can be Achieved at the Bilateral, Regional, and Multilateral levels", *Journal of International Economic Law*, Vol. 2, No. 3, 1999, 426-429.

⁷¹⁴ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 313.

⁷¹⁵ D. Klawiter & C. Laciak, "International Competition Cooperation: No Longer Just the Formal Agreements", *The Antitrust Review of the Americas, A Global Competition Review Special Report*, 2003, 24.

⁷¹⁶ Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws, Washington, 23 September 1991 (1991 EU-US Agreement); Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, Brussels & Washington, 4 June 1998 (1998 Positive Comity Agreement); US-EU Merger Working Group, Best Practices on Cooperation in Merger Investigations, 2002, http://ec.europa.eu/competition/international/bilateral/eu_us.pdf; US-EU Merger Working Group, Best Practices on Cooperation in Merger Investigations, 2011, available at

comparative analysis of the abovementioned agreements indicate that the EU-US Agreement can be considered a model for later EU first generation agreements. Moreover, the EU-US Agreement relates to two very experienced competition law enforcers and trade actors, and has been in force for over 25 years.⁷¹⁷

The earliest formal competition cooperation agreements date back to the seventies and eighties, more precisely the 1976 US - Germany agreement, the 1982 US-Australia and US - Canada agreements, and the 1987 agreement between France and Germany.⁷¹⁸ The US has been at the forefront of formalised bilateral cooperation agreements, while the EU has invested more in multilateral cooperation.⁷¹⁹ As mentioned before, for the US the conclusion of cooperation agreements was a form of ‘self-restraint’ when it came to its aggressive extraterritorial antitrust enforcement. However, according to a Commission official the EU-US Agreement was not a ‘defensive’ agreement, like the ones previously concluded by the US with Australia, Canada, or Germany, but was more positive in approach with an emphasis on cooperation.⁷²⁰ Another major catalyst for the emergence of bilateral cooperation agreements was the work done by the OECD in the form of formal policy recommendations.⁷²¹ It nevertheless took some time before the ideas offered in these recommendations were included in bilateral cooperation agreements. The first OECD recommendation indeed dates back to 1967, almost ten years prior to the first bilateral cooperation agreement.

The first transatlantic bilateral cooperation agreement on competition law followed fifteen years after the 1976 agreement, on the initiative of the Competition Commissioner at the time, SIR LEON BRITTAN.⁷²² Factors that play a role when deciding whether or not to cooperate include the perceived usefulness of cooperation, the relationship between the relevant agencies and the knowledge of each other’s procedures. One can assume that these factors play to an even larger extent when deciding whether or not to conclude a cooperation agreement with another jurisdiction, where cooperation will likely occur more regularly.⁷²³

http://ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf (accessed October 2015); Agreement between the European Communities and the Government of Canada regarding the application of their competition laws, Bonn, 17 June 1999 (EU-Canada Agreement); Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities, Brussels, 10 July 2003 (EU-Japan Agreement); Agreement between the European Community and the Government of the Republic of Korea concerning cooperation on anti-competitive activities, Seoul, 23 May 2009 (EU-Korea Agreement).

⁷¹⁷ See V. Demedts, “International Competition law enforcement: different means, one goal?”, *Competition Law Review*, Vol. 8, No. 3, 2012, 238-240.

⁷¹⁸ M. Taylor, *International Competition Law: a New Dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 109.

⁷¹⁹ P. Holmes, H. Müller, A. Papadopoulos, & A. Sydorak, “A Taxonomy of International Competition Cooperation Provisions”, paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 39.

⁷²⁰ L. Keegan, “The 1991 U.S./EC Competition Agreement: a glimpse of the future through the United States v. Microsoft Corp. window”, *Journal of International Legal Studies*, Vol. 2, Summer 1996, 150-151, quoting Commission official Auke Haagsma.

⁷²¹ M. Taylor, *International Competition Law: a New Dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 108.

⁷²² M. Blauburger, “The Governance of Overlapping Jurisdictions. How International Cooperation Enhances the Autonomy of Competition Authorities”, *Transtate Working Papers*, No. 102, Bremen, 2009, 8.

⁷²³ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 313.

The EU-US Agreement was inspired by the 1986 OECD Recommendation Concerning Restrictive business practices Affecting International Trade, to which the EU and the US both adhered. The Commission wanted to draw up a legally binding document.⁷²⁴ The negotiations proceeded expeditiously. In less than a year they were finished, motivated in particular by the entry into force of Regulation 4064/89 (the merger regulation), which would have a considerable impact on the potential instances of conflict between both legal systems as the array of potential mergers falling under both jurisdictions would increase significantly. After approval by the college of Commissioners, SIR LEON BRITTAN signed and concluded the agreement on behalf of the Commission, while the Attorney General and President of the Federal Trade Commission, representing the US government, did the same for the US. Member states never expressed discomfort with the content of the Agreement during these negotiations, but some questioned whether it should have been the Commission alone to conclude the Agreement.⁷²⁵ The competence of the Commission to conclude the agreement was successfully challenged by France (see below, Part II, 2.3.1), causing the agreement to be concluded under different terms in 1995, nevertheless maintaining its content.

Apart from the 1991 EU-US Agreement and the 1998 EU-US Positive Comity Agreement, transatlantic cooperation consists of a set of Best Practices on Cooperation in Merger Investigations, issued by the US-EU Merger Working Group in 2002, and revised in 2011.⁷²⁶ This ‘addition’ was intended to serve as an advisory framework offering best practices for interagency cooperation, more precisely when US and EU antitrust agencies review the same merger. As it represents a mere advisory framework, the agencies involved retain full discretion regarding the implementation and it is explicitly stated that nothing in the document is intended to modify or create any enforceable rights.⁷²⁷ The Best Practices confirmed and built upon existing practice, and therefore formalised what was already taking place informally between EU and US competition agencies. It should be mentioned, however, that this ‘extension’ of the original bilateral dedicated agreement via best practices rather than an amendment to the agreement is unique to EU-US relations and does not appear in the context of any of the EU’s other bilateral competition agreements.

According to KOVACIC the advances in EU-US cooperation in key respects resembled the core elements of the New Transatlantic Agenda established in 1995, aimed, *inter alia*, at improving the quality and reducing the cost of regulating transatlantic commerce. The New Transatlantic Agenda sought to strengthen regulatory coordination between the two jurisdictions by enhancing interaction at several levels in a process-oriented approach. First, by encouraging intergovernmental contacts among the chiefs of government and other high level public officials; second, by stimulating trans-governmental contacts on a day-to-day basis among lower level officials; and finally, by motivating

⁷²⁴ L. Keegan, “The 1991 U.S./EC Competition Agreement: a glimpse of the future through the United States v. Microsoft Corp. window”, *Journal of International Legal Studies*, Vol. 2, Summer 1996, 160-162.

⁷²⁵ E. Baroncini, “La Cour de justice et le treaty making power de la Commission européenne depuis l’Accord de coopération dans l’application des régimes antitrust jusqu’à l’Accord sur les orientations en matière de coopération normative et de transparence”, *Revue du Droit de l’Union Européenne*, No. 2, 2006, 377.

⁷²⁶ US-EU Merger Working Group, Best Practices on Cooperation in Merger Investigations, 2002, available at http://ec.europa.eu/competition/international/bilateral/eu_us.pdf (accessed October 2015); US-EU Merger Working Group, Best Practices on Cooperation in Merger Investigations, 2011, available at http://ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf (accessed October 2015).

⁷²⁷ US-EU Merger Working Group, Best Practices on Cooperation in Merger Investigations, 2011, available at http://ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf (accessed October 2015), 1-2.

transnational contacts among non-government institutions and individuals such as academics or the business community.⁷²⁸

2.2 Cooperation mechanisms in the EU-US Agreement

The main purpose of first generation competition cooperation agreements, apart from generally promoting cooperation and coordination, is to reduce or avoid conflict generated by the simultaneous application of the competition laws of different jurisdictions to the same case and to enhance the effective enforcement of the parties' competition laws.⁷²⁹ As already mentioned, the cooperation mechanisms that are included in first generation agreements to pursue these goals mainly relate to case-specific cooperation, but they may also contribute to a more general policy dialogue.⁷³⁰

The competition laws that fall under the Agreement are referred to specifically, with the addition of such other laws or regulations as the Parties agree in writing to be a competition law for purposes of the agreement. The requirement of written consent serves to ensure that the definition of what is a competition law is not extended beyond its intended scope, while nevertheless taking into account the possibility that further laws or implementing regulations may be adopted in the future.⁷³¹

2.2.1 Notification

While it is said that the entire cooperation process starts with notification,⁷³² this was perhaps more the case at the time of conclusion of first generation agreements than it is today, when cooperation can take place even before a formal notification is issued, as competition authorities are generally more aware of possible infringements, for instance via the media.⁷³³ A notification requirement nevertheless remains useful in the fight against selective enforcement with protectionist intent.⁷³⁴

The 1991 EU-US Agreement requires parties to notify each other whenever their competition authorities become aware that their enforcement activities may affect important interests of the other

⁷²⁸ W. Kovacic, "Nine next steps for transatlantic antitrust policy cooperation", *CPI Antitrust Chronicle*, Vol. 1, October 2011, 3.

⁷²⁹ Article I 1991 EU-US Agreement. Similarly: Article I EU-Canada Agreement, Article 1 EU-Japan Agreement, and Article 1 EU- Korea Agreement.

⁷³⁰ H. Dieckmann, "The Benefits of Cooperation between Competition Authorities", Inaugural Symposium of the Competition Policy Research Center, Tokyo, 2003, available at <http://www.jftc.go.jp/cprc/DP/CPDP-9-E.pdf> (accessed December 2011), 5.

⁷³¹ Communication from the Commission to the Council concerning the Agreement between the European Communities and the Government of the United States on the application of positive comity principles in the enforcement of their competition laws, COM(97) 233 final, 97/0178(CNS), 18 June 1997, 6.

⁷³² P. Holmes , H. Müller, A. Papadopoulos, & A. Sydorak, "A Taxonomy of International Competition Cooperation Provisions", paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 43.

⁷³³ See C. Damro, "Comparing International EU Competition Cases: What Can Business and Politics Learn?", paper prepared for presentation at the European Union Studies Association 11th Biennial International Conference, Los Angeles California, 23-25 April 2009, 8.

⁷³⁴ A. Bradford & T. Büthe, "Competition policy and free trade – Antitrust provisions in PTAs" in A. Dür, M. Elsig (eds), *Trade cooperation – the purpose, design and effects of preferential trade agreements*, Cambridge University Press, Cambridge, 2015, 267.

Party.⁷³⁵ This is quite vague in itself, so guidance is provided with regard to the type of enforcement activities that would ordinarily require notification. The Agreement provides the parties with a non-exhaustive list of such situations, as well as an indication of the appropriate timing of notification, where a distinction is made between merger proceedings and other matters.⁷³⁶ The provision is quite specific with regard to the timing of notifications in merger cases,⁷³⁷ but remains rather cryptic and unartful in other cases, stating that “*notification shall ordinarily be provided at the stage in an investigation when it becomes evident that notifiable circumstances are present, and in any event far enough in advance of: (a) the issuance of a statement of objections in the case of the Commission of the European Communities, or a complaint or indictment in the case of the Government of the United States of America; and (b) the adoption of a decision or settlement in the case of the Commission of the European Communities, or the entry of a consent decree in the case of the Government of the United States of America; to enable the other Party's views to be taken into account.*”⁷³⁸ Such ‘instructions’ do not provide much clarity to those in charge of implementing the agreement, or others wishing to learn from the Agreement. Parties should also notify each other in case their competition authorities participate in any way in regulatory or judicial proceedings that do not arise from their own enforcement activities, and if this participation may affect the other Party's important interests. This applies to public regulatory or judicial proceedings, public intervention or participation pursuant to formal procedures; and in the case of regulatory proceedings in the United States, only proceedings before federal agencies. Contrary to the level of detail with regard to timing, the Agreement is silent about the content of notifications under the Agreement, apart from the fact that they should contain enough information to allow the recipient party to make an initial assessment of any effects on its interests.⁷³⁹ Again, not much grip is given to those burdened with the implementation of the Agreement or those wishing to learn from it.

As is valid for most provisions in this Agreement, notification can happen outside of the framework of a formal cooperation agreement as well. The OECD Recommendations issued on the matter are generally considered a sufficient basis. Nevertheless, analysis of the number of notifications between 1991 and 2000 reveals a much higher notification-rate from the EU to the US than to other OECD partners. ZANETTIN derives from this that a bilateral agreement provides stronger incentives to

⁷³⁵ Article II 1991 EU-US Agreement.

⁷³⁶ It already deserves to be mentioned here that this approach is abandoned in the EU's second generation Agreement with Switzerland, see below, Part II, 3.2.3.

⁷³⁷ Article II.3 1991 EU-US Agreement: “*With respect to mergers or acquisitions required by law to be reported to the competition authorities, notification under this Article shall be made:*

a) In the case of the Government of the United States of America,

(i) not later than the time its competition authorities request, pursuant to 15 USC §18a(e), additional information or documentary material concerning the proposed transaction,

(ii) when its competition authorities decide to file a complaint challenging the transaction, and

(iii) where this is possible, far enough in advance of the entry of a consent decree to enable the other Party's views to be taken into account; and

b) In the case of the Commission of the European Communities,

(i) when notice of the transaction is published in the Official Journal, pursuant to Article 4(3) of Council Regulation no. 4064/89, or when notice of the transaction is received under Article 66 of the ECSC Treaty and a prior authorization from the Commission is required under that provision,

(ii) when its competition authorities decide to initiate proceedings with respect to the proposed transaction, pursuant to Article 6(1)(c) of Council Regulation no. 4064/89, and

(iii) far enough in advance of the adoption of a decision in the case to enable the other Party's views to be taken into account.”

⁷³⁸ Article II 1991 EU-US Agreement. Similarly: Article II EU-Canada Agreement, Article 2 EU-Japan Agreement, and Article 2 EU-Korea Agreement.

⁷³⁹ Article II 1991 EU-US Agreement, Article II EU-Canada Agreement, Article 2 EU-Japan Agreement, and Article 2 EU-Korea Agreement. This feature is subject to change in the EU's second generation Agreement with Switzerland, see below, Part II, 3.2.3.

notify than the OECD recommendations and that seemingly parties to a bilateral agreement pay more attention to each other's interests.⁷⁴⁰ One must not deduct from this statement, however, that it is the existence of a formalized agreement itself that is responsible for this stronger engagement. It is very plausible that it is due to the extensive history of dialogue between officials or simply that the EU and US have the two biggest markets involved, and therefore instances of affected interests are more frequent, that the number of notifications is higher. These are reasons to enter into a cooperation agreement in the first place. The causal relationship is therefore uncertain.

Communications under the 1991 Agreement, including notifications under Articles II (notification) and V (positive comity), may be carried out by direct oral, telephonic, written or facsimile communication from one Party's competition authority to the other Party's authority. Notifications under Articles II, V and XI (entry into force, termination and review), and requests under Article VII (consultation), shall be confirmed promptly in writing through diplomatic channels.⁷⁴¹

The original Reports from the Commission to the Council and the European Parliament on the application of the Agreement provided an overview of all notifications under the Agreement for a certain timeframe. This practice stopped when these Reports were absorbed by the more general Annual Reports on Competition Policy and the accompanying Staff Working Documents (see above, introduction, and see below, Part II, 2.4).

2.2.2 Exchange of information

The exchange of information is central in enforcement cooperation between competition agencies. The parties to the 1991 Agreement recognised the importance of sharing information that would facilitate the effective application of their respective competition laws or that will help them better understand economic conditions and theories relevant to their enforcement activities. Exchanging information may happen on request, and biannual meetings (at minimum) between officials from the competition authorities are foreseen. Flexibility is offered with regard to the format of such meetings or the bureaucratic level at which the meetings should take place ('appropriate officials').⁷⁴² These meetings could for instance occur in the margin of multilateral meetings such as the ICN annual meeting.

Topics to be discussed include enforcement activities and priorities, economic sectors of common interest, policy changes under consideration, and other matters of mutual interest relating to the application of competition laws. The Agreement furthermore provides that parties should provide each other "*with any significant information that comes to the attention of its competition authorities about anticompetitive activities that its competition authorities believe is relevant to, or may warrant, enforcement activity by the other Party's competition authorities.*"⁷⁴³ A requested party should provide the information if it is in its possession and in so far it is relevant to an enforcement activity being considered or conducted by the requesting Party's competition authorities. What can be exchanged is information that is in the public domain, and even though it is not specified in the agreement, it is common practice to

⁷⁴⁰ B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 79.

⁷⁴¹ Article X 1991 EU-US Agreement.

⁷⁴² Article III 1991 EU-US Agreement, Article VIII EU-Canada Agreement, Article 8 EU-Japan Agreement, and Article 8 EU-Korea Agreement.

⁷⁴³ Article III EU-US agreement. Also see Article VII EU-Canada Agreement, Article 3 EU-Japan Agreement, and Article 3 EU-Korea Agreement.

exchange so-called ‘confidential agency information’ as well (see below, Part II, 3.4.4). It must be pointed out that the agreement does not *oblige* a party to share information in any way.

The exchange of information is limited in one important way: the exchange of confidential information is excluded. This should be distinguished from confidential agency information, and includes inter alia premerger notifications, the responses to investigational inquiries, or identities of complainants or witnesses.⁷⁴⁴ The Exchange of Interpretative Letters annexed to the Agreement provides further clarity on what is considered to be confidential information: “*the information covered by the provisions of Article 20 of Council Regulation 17/62⁷⁴⁵ or by equivalent provisions in other regulations in the field of competition may not under any circumstances be communicated by the Commission to the US antitrust authorities, save with the express agreement of the source concerned.*” Information that was transmitted will be protected from disclosure, unless the disclosure was authorized by the Party supplying the information, or required under the law of the receiving Party.⁷⁴⁶ The guiding principle remains that the agencies attempt to maintain to the fullest extent possible the confidentiality of any information provided to it in confidence, and to oppose to the fullest extent possible any application for disclosure of such information by a third party.⁷⁴⁷ The exchange of letters confirms that information that is provided in confidence by one party merits the protection provided by the other party’s applicable rules, including domestic confidentiality rules and that both parties will use all the available legal means to oppose the disclosure of this information. The relationship between the Commission and the Member States is clarified. If the Commission notifies the US antitrust authorities, it will inform the Member States whose interests are affected. It will also, after consultation with the US authorities, inform them of any cooperation and coordination of enforcement activities. It is added that both parties will respect requests not to disclose the information that was provided, when necessary to ensure confidentiality, subject to any contrary requirement of the applicable law.

Parties are not required to exchange information the disclosure of which is prohibited by the law of the Party possessing the information or if the exchange would be incompatible with important interests of the Party possessing the information. Each Party furthermore commits to maintaining to the fullest extent possible the confidentiality of any information provided to it in confidence by the other Party under the Agreement, including the opposition to any application for disclosure of such information by a third party that is not authorized by the Party that supplied the information.⁷⁴⁸ Indeed, while the communications between competition authorities may not necessarily contain confidential information *sensu stricto*, they may nevertheless include sensitive information which should not be disclosed to a third party.⁷⁴⁹ The 2012 OECD/ICN Joint Survey confirmed that more

⁷⁴⁴ F. Jenny, “International Cooperation on Competition: Myth, Reality and Perspective”, *The Antitrust Bulletin*, Vol. 48, Winter 2003, 995-996.

⁷⁴⁵ “1. Information acquired as a result of the application of Articles 11, 12, 13 and 14 shall be used only for the purpose of the relevant request or investigation.

2. Without prejudice to the provisions of Articles 19 and 21, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the application of this Regulation and of the kind covered by the obligation of professional secrecy.

3. The provisions of paragraphs 1 and 2 shall not prevent publication of general information or surveys which do not contain information of undertakings.”

⁷⁴⁶ For instance in court proceedings.

⁷⁴⁷ Article VIII(2) 1991 EU-US Agreement.

⁷⁴⁸ Article VIII 1991 EU-US Agreement.

⁷⁴⁹ OECD, Inventory of co-operation agreements, Note by the secretariat, DAF/COMP/WP3(2015)12/REV1, 20 November 2015, 28.

than a decade after the entry into force of the EU-US Agreement, non-confidential information is frequently exchanged and that such exchanges often take place informally.⁷⁵⁰

2.2.3 Cooperation and coordination in enforcement

The competition authorities of both Parties are obliged to render assistance to each other, but only to the extent that it is compatible with their own jurisdictions' laws and important interests, and within its reasonably available resources.⁷⁵¹ This gives the competition authorities broad discretion in deciding whether or not to cooperate, in particular considering that once cooperation is started, each competition authority can limit or terminate its participation in a coordination arrangement and pursue its enforcement activities independently, as long as 'appropriate' notice is given. Indeed, first generation agreements *allow* cooperation rather than *require* it. It can be assumed that 'appropriate' in this context does not solely refer to the timing of the notification, but also requires sufficient motivation. An explicit commitment to motivate would however have been desirable.

The Parties are given the opportunity to coordinate their enforcement activities in the event of mutual interest in pursuing related enforcement activities. The Agreement specifies the factors that should be taken into account when deciding whether or not to coordinate, relating to resource efficiency, gathering of information, achievement of objectives, and cost-reduction for those subject to the enforcement activities. These factors reflect the general attitude of the EU that the extent of the cooperation between the EU and third countries on competition cases depends on the specific circumstances of the case. Elements of interest could indeed be whether it involves an international or a world-wide cartel or whether novel issues are at stake where it would be necessary to exchange views. The decision to cooperate is taken on a case-by-case basis, with particular attention for the centre of gravity of the behaviour.⁷⁵² The fact that an agreement is concluded with a particular country, does not seem to add to the decision to cooperate or not.

In furtherance of their engagement to coordinate enforcement activities, the EU and the US in 1999 concluded a so-called Administrative Arrangement on Attendance. This bilateral and reciprocal Arrangement allows the US competition authorities to attend oral hearings in competition proceedings before the European Commission as observers, in appropriate cases of mutual concern, and permits the Commission to attend at high level meetings (so-called 'pitch meetings') between the US competition authorities and the parties in US antitrust cases. Attendance is allowed 'in appropriate cases', when satisfactory assurances or arrangements regarding confidentiality and the use of information are in place. Express consent of the persons concerned by the enforcement proceedings in either jurisdiction is required, however, and their rights are not in any way limited by the arrangements.⁷⁵³ The text of the Arrangement is available via document request, but little

⁷⁵⁰ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 13.

⁷⁵¹ Article IV 1991 EU-US Agreement, Article IV EU-Canada Agreement, Article 4 EU-Japan Agreement, and Article 4 EU-Korea Agreement.

⁷⁵² OECD, Global Forum on Competition, Improving international co-operation in cartel investigations, Contribution from the European Union, DAF/COMP/GF/WD(2012)53, 9 February 2012, 4-5.

⁷⁵³ Commission Report to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, 1 January 1999 to 31 December 1999, COM(2000) 618 final, 4 October 2000, 5-6.

information is available on its practical application.⁷⁵⁴ The Arrangement has been invoked several times by the US antitrust agencies to attend oral hearings at the Commission, for instance in the *BOC/Air Liquide*, *Time Warner/EMI*, *AOL/Time Warner*, *WorldCom MCI/Sprint*, *GE/Honeywell*, and *Alcoa/Reynolds* merger cases. There is less mention of Commission officials attending pitch meeting at the DoJ. This happened for the first time in 2000 in connection with the *MCI WorldCom/Sprint* case.⁷⁵⁵

2.2.4 Comity

2.2.4.1 Negative comity or avoidance of conflicts

One of the central objectives of the EU's bilateral competition cooperation agreements is the avoidance of conflicts over enforcement activities. The main mechanism to achieve this is 'negative comity', 'traditional comity', 'the non-interference principle', or 'the principle of voluntary abstention', although it will become clear that the last two denominations do not really cover the load.⁷⁵⁶

Comity arose as a means for mitigating the negative effects of the unilateral assertion of extraterritorial jurisdiction, in particular by the US, and to achieve a balance between the different policy- and enforcement concerns of the states involved. It has been recognized for over a hundred years by public international law, and knows a wide application beyond international competition matters, for instance in tax, insolvency, anti-bribery, and environmental cases.⁷⁵⁷ Some claim that the preconditions for cooperation under a comity-arrangement are relatively low, and that therefore first generation agreements containing this mechanism constitute an appropriate instrument for cooperation among competition authorities that have not yet engaged in earlier cooperation.⁷⁵⁸ One might, however, strongly disagree, as will become clear below.

The OECD defines comity as the legal principle that countries should mutually take each other's important interests into account while conducting their law enforcement activities. Comity therefore does not imply an abdication of jurisdiction (hence the inappropriateness of the terms 'voluntary abstention' and 'non-interference principle'), but it is rather the exercise of jurisdiction with regard for the impact that this may have on the law enforcement activities of other countries. Basically international comity refers to judicial respect for the sovereignty of foreign nations. ZAMBRANO

⁷⁵⁴ The text of the Arrangement is not public, but some information is provided in EU Bulletin 3-1999, Competition (18/43).

⁷⁵⁵ I. Van Bael, *Due Process in Competition Proceedings*, Alphen aan den Rijn, Wolters Kluwer, 2011, 63; M. Dabbah, "Future directions in bilateral cooperation: A policy perspective" in A. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 291; Commission Decision declaring a concentration to be compatible with the common market and the EEA Agreement, Case No COMP/M.1630 - Air Liquide / BOC, 18 January 2000; Commission Decision declaring a concentration incompatible with the common market and the EEA Agreement, Case No COMP/M.1741 - MCI WorldCom / Sprint, 28 June 2000.

⁷⁵⁶ E. Elhauge & D. Geradin, *Global Competition Law and Economics*, 2nd ed., Oxford and Portland Oregon, Hart Publishing, 2011, 1176; OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through 'Positive Comity' in Competition Law Enforcement, DAF/CLP(99)19, 14 June 1999, 5.

⁷⁵⁷ OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Background Note, DAF/COMP/GF(2012)6, 13 February 2012, 4.

⁷⁵⁸ M. Taylor, *International Competition Law: a New Dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 113.

referred to it as ‘the judicial way of conducting diplomacy.’⁷⁵⁹ The WTO defines comity in the context of international cooperation in competition law matters as the whole of factors and issues taken into account by a competition authority when deciding to pursue international enforcement action.⁷⁶⁰ The United States Supreme Court first defined the legal notion of comity in *Hilton v Guyot* in 1895, a case not related to competition law. The US Supreme Court considered comity to be a horizontal, sovereign state-to sovereign state concept, which finds itself in between the extremes of absolute obligation and mere courtesy and good will. It added that “*it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.*”⁷⁶¹ This definition emphasises the balancing act that should take place.

The 1991 EU-US Agreement marked the first time that the concept has been codified in a binding international agreement on competition law, which is somewhat of a contradiction in itself.⁷⁶² In the Agreement, parties are obliged, *albeit* within the framework of their own laws and to the extent compatible with their important interests, to take into account each other’s important interests, at all stages of enforcement activity, in particular when deciding on the initiation and scope of an investigation or proceeding, and with regard to the nature of the remedies or penalties sought.⁷⁶³

The agreement provides some guiding principles with regard to the application of the comity principle. First, while it is accepted that a party may have an important interest with regard to a particular case even in the absence of official involvement, a presumption exists that important interests will generally be reflected in antecedent laws, decisions or statements of policy by the other party’s competent authorities.⁷⁶⁴ Furthermore, even if such important interests can be affected at any stage of enforcement activity, the risk is higher in the remedial stage of the enforcement process than in the investigative stage. Finally, a non-exhaustive list is provided of factors to be taken into account by the parties when seeking an appropriate accommodation of the competing interests, where it

⁷⁵⁹ D. Zambrano, “A Comity of Errors: The Rise, Fall, and Return of International Comity in ‘Transnational Discovery’”, *Berkeley Journal of International Law*, Vol. 34, No. 1, Spring 2006, 162.

⁷⁶⁰ WTO, World Trade Report 2004: Exploring the Linkages Between the Domestic Policy Environment and International Trade, https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report04_e.pdf (accessed October 2015), 159.

⁷⁶¹ OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Background Note, DAF/COMP/GF(2012)6, 13 February 2012, 4, footnote 2. The reason why different definitions of comity are mentioned at this point is because the concept of comity is sometimes surrounded by a haze of confusion. The US’ Restatement of the Foreign Relations Law (Third) mentions that comity, as opposed to the independent principle of reasonableness (“*Even when one of the bases for jurisdiction under s 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.*” Restatement of the Law (Third), comment (a) of Section 403 ‘Limitations on Jurisdiction to Prescribe’, available at <http://www.kentlaw.edu/perritt/conflicts/rest403.html>, (accessed June 2015)) is not a rule of international law, but that it is rather a factor for determining reasonableness, and when there are conflicting reasonable exercises of jurisdiction. (B. Peck, “Extraterritorial Application of Antitrust Laws and the U.S.-EU Dispute over the Boeing and McDonnell Douglas Merger: From Comity to Conflict? An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution”, *San Diego Law Review*, Vol. 35, 1998, 1177) Some US courts have, however, reversed the logic, and have applied the principle of reasonableness as a requirement of comity. (Restatement of the Law (Third), comment (a) of Section 403 ‘Limitations on Jurisdiction to Prescribe’, available at <http://www.kentlaw.edu/perritt/conflicts/rest403.html>, (accessed June 2015)).

⁷⁶² E. Baroncini, “La Cour de justice et le treaty making power de la Commission européenne depuis l’Accord de coopération dans l’application des régimes antitrust jusqu’à l’Accord sur les orientations en matière de coopération normative et de transparence”, *Revue du Droit de l’Union Européenne*, No. 2, 2006, 378.

⁷⁶³ Article VI 1991 EU-US Agreement.

⁷⁶⁴ This presumption disappears in the EU’s second generation Agreement with Switzerland, see below, Part II, 3.2.3.

appears that one party's enforcement activities may adversely affect important interests of the other party. Such factors include the relative significance of anticompetitive conduct occurring in either party's territory, the absence or presence of anticompetitive purpose, the relative significance of the effects of the anticompetitive activities on either party's interests, the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities, the degree of conflict or consistency with the other party's laws or articulated economic policies, and finally the extent to which related enforcement activities of the other party may be affected.⁷⁶⁵

The US, in its 1995 Antitrust Enforcement Guidelines for International Operations, offered slightly more detailed information on the factors its antitrust agencies and courts may take into account when performing a comity analysis. The non-exhaustive list, with factors to be weighed on a case-to-case basis, includes:

- *the relative significance to the alleged violation of conduct within the United States, as compared to conduct abroad;*
- *the nationality of the persons involved in or affected by the conduct;*
- *the presence or absence of a purpose to affect U.S. consumers, markets, or exporters;*
- *the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad;*
- *the existence of reasonable expectations that would be furthered or defeated by the action;*
- *the degree of conflict with foreign law or articulated foreign economic policies;*
- *the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected; and*
- *the effectiveness of foreign enforcement as compared to U.S. enforcement action.*⁷⁶⁶

The factors overlap to a certain extent but are not identical. In 2017 the Enforcement Guidelines were revised.⁷⁶⁷ They reiterate that the relative weight given to each factor taken into account in a comity analysis depends on the facts and circumstances of each case. Among the factors weighed, the existence of a purpose to affect or an actual effect on US commerce, the significance and foreseeability of the effects of the anticompetitive conduct on the United States, the degree of conflict with a foreign jurisdiction's law or articulated policy, the extent to which the enforcement activities of another jurisdiction, including remedies resulting from those enforcement activities, may be affected, and the effectiveness of foreign enforcement as compared to US enforcement are

⁷⁶⁵ Article IV 1991 EU-US Agreement, Article VI EU-Canada Agreement, Article 6 EU-Japan Agreement, and Article 5 EU-Korea Agreement.

⁷⁶⁶ The U.S. Department of Justice and the Federal Trade Commission, "Antitrust Enforcement Guidelines for International Operations", April 1995, <http://www.justice.gov/atr/public/guidelines/internat.htm>.

⁷⁶⁷ More generally the revision restructures the guidelines to make them more useful and more accessible. It does so by focusing on the most significant questions from the point of view of the users. The revision describes current practices and methods of analysis used in cases with an international dimension. In particular, the revision adds a chapter on international cooperation, which addresses the US agencies' investigative tools, confidentiality safeguards, the legal basis for cooperation, types of information exchanged and waivers of confidentiality, remedies and special considerations in criminal investigations, it updates the discussion of the application of US antitrust law to conduct involving foreign commerce, the Foreign Trade Antitrust Improvements Act, foreign sovereign immunity, foreign sovereign compulsion, the act of state doctrine and petitioning of sovereigns, in light of developments in law and practice, and it provides revised illustrative examples. (<https://www.justice.gov/atr/guidelines-and-policy-statements-0/antitrust-guidelines-international-enforcement-and-cooperation-2017>, accessed August 2017).

mentioned.⁷⁶⁸ In the US there is no single, unified set of factors that courts use when assessing comity. Different courts apply different factors. The US Supreme Court for instance followed the Restatement (Third) of Foreign Relations Law,⁷⁶⁹ while the prominent Second Circuit court applied four principal factors derived from the Restatement (Second) of Foreign Relations Law.⁷⁷⁰

The Supreme Court in *Société Nationale Industrielle Aerospatiale* outlined a five-part test that is applicable where the protection of the EU's leniency programme is balanced against US discovery requests. The five factors taken into account were how important the requested information was to the US litigation, how specific the request was, whether the information originated in the US, whether there were alternative means of securing the information, and to what extent the refusal of the request would have undermined important US interests, or complying with the request would have undermined important interests of the state where the information is located. The last factor is considered to carry the most weight.⁷⁷¹ In *Rubber Chemicals*, the District Court had to rule on a discovery request for certain communications between an EU leniency applicant and the Commission in a competition case. The District Judge found that “*the conspiracy sought to restrain trade in Europe (factor 1), that the document requests were fairly specific (factor 2), and that the documents were created, transmitted, and used only in Europe in relation to European proceedings (factor 3). Furthermore, the relevant information contained in the requested documents could be obtained from the public versions of the Commission's findings (factor 4). Finally, the court accepted that the disclosure of the documents would undermine the Commission's ability to carry out investigations by giving companies a disincentive to cooperate with the Commission (factor 5).*”⁷⁷² The Court therefore decided not to disclose the documents.⁷⁷³ The *Aerospatiale* test was criticized, however, for allowing the overvaluation of US interests and only pretending to offer a balancing test.⁷⁷⁴

The comity provision in the 1991 EU-US Agreement was drafted cautiously. Parties should only ‘seek’ to take into account each other's important interests, ‘as appropriate’, and ‘within the framework of their own laws and to the extent compatible with their important interests’. There are very few documented examples of the use of traditional comity. One noted instance was the *Oracle/People Soft* merger, wherein the European Commission decided to delay its investigation until the US proceedings had been completed.⁷⁷⁵ In this case the DoJ Antitrust Division objected to the

⁷⁶⁸ US Department of Justice and Federal Trade Commission, “Antitrust Guidelines for International Enforcement and Cooperation”, January 2017, <https://www.justice.gov/atr/internationalguidelines/download>, 28.

⁷⁶⁹ *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. (1987), 544 (citing Restatement (Third) of the Foreign Relations Law of the US § 442 (1987)).

⁷⁷⁰ S.R. Miller, K. Nordlander, J.C. Owens, “U.S. discovery of European Union and U.S. leniency applications and other confidential investigatory materials”, *CPI Antitrust Journal*, March 2010, 6. C. Nicolosi, “No Good Whistle Goes Unpunished: Can We Protect European Antitrust Leniency Applications from Discovery?”, *Northwestern Journal of International Law & Business*, Vol. 31, No. 1, 2011, 248.

⁷⁷¹ I. Vandenborre, “The confidentiality of EU Commission cartel records in civil litigation: the ball is in the EU Court”, *European Competition Law Review*, 2011, 119; X. “US Court Rules That Confidential European Commission Documents Are Not Discoverable in US Antitrust Litigation”, *Cleary Gottlieb Alert Memo*, 14 September 2010. See *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. (1987).

⁷⁷² X. “US Court Rules That Confidential European Commission Documents Are Not Discoverable in US Antitrust Litigation”, *Cleary Gottlieb Alert Memo*, 14 September 2010.

⁷⁷³ *Ibid.*

⁷⁷⁴ D. Zambrano, “A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery”, *Berkeley Journal of International Law*, Vol. 34, No. 1, Spring 2016, 199-201.

⁷⁷⁵ E. Swaine, “Cooperation, Comity, and Competition Policy: United States” in A. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 17. Also see European Commission, Press Release, “Commission clears Oracle's takeover bid for PeopleSoft”, IP/04/1312, Brussels, 26 October 2004.

merger because it was likely to give rise to competition problems in the relevant market for software applications for automated financial management system and human resources processes. This was in line with the view of the European Commission. The US District Court however rejected this decision due to gaps in the definition of the relevant market. The European Commission then decided to clear the merger, taking into account evidence gathered as part of the proceedings before the District Court. This would not have been possible without the existence of the bilateral cooperation agreement between the US and the EU.⁷⁷⁶ It is advisable that when it has played during a certain case, it is included in the press release. This would offer guidance to other agencies, and would in general lead to increased transparency.

This limited documented use also demonstrates that comity might indeed not be the ‘low-threshold’ cooperation mechanism it is sometimes held to be. The development of the concept of comity in case-law further demonstrates this point. The concept was first raised before the European courts by IBM in 1981, long before the conclusion of the EU-US Agreement, claiming that the Commission violated the international principles of comity between nations and non-interference in internal affairs, because it did not take into account that IBM’s anticompetitive conduct mainly occurred in the US, where it was also the subject of legal proceedings.⁷⁷⁷ The Court, however, did not pronounce itself on this issue as IBM’s claim was declared inadmissible.

The second time the issue arose before an EU Court was in the *Wood Pulp* case, where certain Canadian applicants held that the Commission had infringed Canada’s sovereignty and the principle of international comity. It was also maintained that the application of the EU competition rules in this case harmed US interests in promoting exports by US companies that were exempted from the US’ antitrust laws (by the Webb Pomerene Act of 1918). In response to this claim, the Court first defined the principle of comity very narrowly as only playing when a person is subject to two contradictory, legitimate, orders. It is therefore not enough that rules differ, one rule must actively proscribe the behaviour prohibited by another. In such a situation ‘each State is obliged to exercise his jurisdiction with moderation.’ Secondly, the Court rather counter-intuitively ruled that it was not necessary to investigate whether the rule of comity existed in international law, because the conditions for its application were in any event not satisfied. It appears strange to test *prima facie* the fulfilment of the conditions of a rule of which the existence is not confirmed. In this case, the conduct required by the United States was not contradictory to the EU’s prohibition of export cartels, as the US’ Webb Pomerene Act exempts the conclusion of export cartels from the application of US antitrust laws, but does not require the conclusion of such cartels.⁷⁷⁸ In other words, the Court ruled that there should be mention of true *compulsion* rather than mere *permission* for the comity principle to apply.⁷⁷⁹ The Court reinforced its statement by underlining that the US

⁷⁷⁶ M. Dabbah, “Future directions in bilateral cooperation: A policy perspective” in A. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 292.

⁷⁷⁷ Judgment of 11 November 1981, *International Business Machines Corporation v Commission of the European Communities*, C-60/81, EU:C:1981:264, paragraph 4.

⁷⁷⁸ Judgment of 27 September 1988, *A. Ahlström Osakeyhtiö and others v Commission of the European Communities*, Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, EU:C:1988:447, (*Wood Pulp*), paragraph 7-8, 19-20.

⁷⁷⁹ D. Geradin, M. Reysen, & D. Henry, “Extraterritoriality, Comity, and Cooperation in EU Competition Law” in A. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 33. This reasoning was later confirmed by the General Court in almost identical terms in its *Gencor* judgment. “*The applicant’s argument that, by virtue of a principle of non-interference, the Commission should have refrained from prohibiting the concentration in order to avoid a conflict of jurisdiction with the South African authorities must be rejected, without it being necessary to consider whether such a rule exists in international law. Suffice it to note that there was no conflict between the course of action required by the South African Government and that required by the Community given that, in their letter of 22 August 1995, the South African competition authorities simply concluded that the*

authorities were consulted by the Commission in accordance with the 1979 OECD Recommendations⁷⁸⁰ and failed to raise any objections relating to any jurisdictional conflict.⁷⁸¹

In *Compagnie maritime belge*, the Court referred to the principle of international comity to claim that “courts in one State should refrain from judging acts of another State carried out in its own territory.”⁷⁸² In another case on liner conferences, namely *Atlantic Container Line*, applicants claimed that the Commission had breached the principle of comity – thereby expressly referring to the cooperation agreements in place between the EU and the US – because it had not explained why its assessment of the practices and issues raised in this case was different from that of the United States. The parties also claimed to be under conflicting obligations. Their argumentation was rightly rejected by the Court as the obligation on the Commission to state reasons under former Article 190 of the EC Treaty cannot be interpreted in such an extensive manner.⁷⁸³ The principle of comity should have been taken into account before the Commission took its decision, it does not interfere with the obligation to state the reasons on which a decision is based.

In the *Showa Denko* and *SGL Carbon* cases, two of the appeal cases following the graphite electrodes cartel,⁷⁸⁴ the parties claimed (expressly and implicitly) that the European Commission failed to obey the comity principle because it had not taken into consideration the fines already imposed on the appellant by the US, Canada and Japan.⁷⁸⁵ The Court opined that the cooperation agreements concluded between the EU and the US are of mere procedural nature, and do not oblige a party to the agreement in any way to counterweigh or take into account penalties imposed by the other party.⁷⁸⁶

As demonstrated, the Court’s relationship with comity has generally been rather uneasy. It has not been very receptive towards comity considerations in the rare cases where the concept appeared in its case-law, also because the concept has often been misused or misinterpreted by the parties relying on it. A final illustrative example is the case *Industries chimiques du fluor (ICF) v European Commission*, a competition case, wherein the Court rejected the argument of the party that international comity had not been respected on the grounds that first, the party failed to clarify the principle invoked or explain how it would apply to the case, and second, because the party used the argument of breach of comity

concentration agreement did not give rise to any competition policy concerns, without requiring that such an agreement be entered into.” Judgment of 25 March 1999, *Gencor Ltd v Commission of the European Communities*, T-102/96, EU:T:1999:65, (Gencor), paragraph 103. The Court thereby adhered to the opinion of the Commission, who in its decision 85/206/EEC referred to comity in an equally limited manner. Commission Decision relating to a proceeding under Article 85 of the EEC Treaty, IV/26.870 - Aluminium imports from eastern Europe, 85/206/EEC, 19 December 1984, paragraph 14 (7).

⁷⁸⁰ OECD, Recommendation of the OECD Council Concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade, C(79)154, 25 October 1979.

⁷⁸¹ Judgment of 27 September 1988, *A. Ahlström Osakeyhtiö and others v Commission of the European Communities*, Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, EU:C:1988:447, (Wood Pulp), paragraph 21.

⁷⁸² Judgment of 8 October 1996, *Compagnie Maritime Belge Transports SA and Compagnie Maritime Belge SA, Dafra-Lines A/S, Deutsche Afrika-Linien GmbH & Co. and Nedlloyd Lijnen BV v Commission of the European Communities*, Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93, EU:T:1996:139, paragraph 88.

⁷⁸³ Judgment of 30 September 2003, *Atlantic Container Line AB and Others v Commission of the European Communities*, Joined Cases T-191/98, T-212/98 to T-214/98, EU:T:2003:245, paragraph 1393, 1405.

⁷⁸⁴ European Commission, Press Release, “Commission fines eight companies in graphite electrode cartel”, IP/01/1010, Brussels, 18 July 2001.

⁷⁸⁵ Judgment of 29 June 2006, *Showa Denko KK v Commission of the European Communities*, C-289/04 P, EU:C:2006:431, paragraph 46.

⁷⁸⁶ Ibid., paragraph 59; Judgment of 29 June 2006, *SGL Carbon AG v Commission of the European Communities*, C-308/04 P, EU:C:2006:433, paragraph 35.

in the wrong way. The party questioned the competence of the EU to apply its competition rules to the conduct in question, but comity is not an instrument to determine jurisdiction or competence, it is a principle that comes into play once jurisdiction is determined.⁷⁸⁷

There is indeed some confusion on whether comity should come into place as a tool to solve jurisdictional conflicts once parallel jurisdiction has been established, or whether the concept serves to *determine* jurisdiction in the first place. In the US *Timberlane* case (see above, Part I, 3.2.1), as well as the US Third Restatement of the Laws, comity was used as a factor to decide on extraterritorial jurisdiction of US antitrust laws. This balancing approach was nevertheless rejected by some other circuit courts. For instance, the 7th Circuit in *In re Uranium Antitrust Litigation* clarified that comity should only play when deciding whether *existing* jurisdiction should be asserted.⁷⁸⁸ The EU Courts have not felt the need to provide clarity about this concept which, as demonstrated, was misinterpreted or misused by the parties invoking it more than once.

An explanation for this rather uneasy relationship may be found in what the US Antitrust Enforcement Guidelines for International Operations state with regard to the appearance of the concept in US case-law. The Guidelines claim that it is not for the US courts to call into question the judgment of the executive branch as to the proper role of comity concerns.⁷⁸⁹ Also in the *Laker Airways* case, the District of Columbia Circuit Court of Appeals declared that the US judiciary should enforce US laws and is not suited to weigh the national interests of various nations.⁷⁹⁰ This attitude might cause the judiciary to be overly careful in judging on comity issues, refusing to even clarify the concept. While interference by the judiciary would be complex to execute, would require the courts to possess detailed information on each case, and might result in difficult outcomes and delays, judiciary overview of the concept, in particular where it is included in first generation agreements, might promote more diligent use of it.

Both the 1995 and 2017 US Antitrust Enforcement Guidelines stated with regard to traditional comity that “*the Agencies will assess the articulated interests and policies of a foreign sovereign beyond whether there is a conflict with foreign law.*”⁷⁹¹ This might indicate a more comprehensive understanding of traditional comity, as opposed to the very restrictive view of the judiciary that requires true conflict. The comity analysis takes into account to what extent certain conduct is encouraged or discouraged by a certain country, or whether the parties are left free to choose among different courses of conduct.⁷⁹²

⁷⁸⁷ Judgment of 18 June 2013, *Industries Chimiques du Fluor (ICF) v European Commission*, T-406/08, EU:T:2013:322, paragraph 215-218.

⁷⁸⁸ B. Peck, “Extraterritorial Application of Antitrust Laws and the U.S.-EU Dispute over the Boeing and McDonnell Douglas Merger: From Comity to Conflict? An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution”, *San Diego Law Review*, Vol. 35, 1998, 1180.

⁷⁸⁹ US Department of Justice and Federal Trade Commission, “Antitrust Enforcement Guidelines for International Operations”, April 1995, <https://www.justice.gov/atr/antitrust-enforcement-guidelines-international-operations> (accessed October 2015).

⁷⁹⁰ M. Joelson, *An International Antitrust Primer: A Guide to the Operation of United States, European Union and Other Key Competition Laws in the Global Economy*, 3rd ed., Alphen aan den Rijn, Kluwer Law International, 2006, 46.

⁷⁹¹ US Department of Justice and Federal Trade Commission, “Antitrust Guidelines for International Enforcement and Cooperation”, January 2017, <https://www.justice.gov/atr/internationalguidelines/download>, 29.

⁷⁹² *Ibid.*

ZAMBRANO argued that three recent US civil cases indicate a revival of the comity concept, in particular in the context of discovery.⁷⁹³ He believed that these cases are an indication that US courts “are following the executive’s lead in refurbishing their international comity bona fides when faced with overbroad discovery requests”, compared to a history of ruling almost unanimously in favour of US interests and rendering comity to a frivolous argument raised by foreign litigants as a last resort.⁷⁹⁴ This ‘pro-forum bias’ reached such heights that courts had developed whole categories of US interests that automatically overcame concerns for foreign laws, including patent law, antitrust law, criminal law, and anti-terrorism laws. It concerns the *Daimler* case, decided upon by the US Supreme Court, the Second Circuit *Gucci* case, and the *Motorola* case before the New York Court of Appeals. In all three cases attempts by plaintiffs to subject foreign entities to US jurisdiction or otherwise impose on them overbroad duties, including those in conflict with foreign laws, were rejected. According to ZAMBRANO, these cases are particularly noteworthy because of the courts that issued them, as well as the fact that they espouse a consistent rejection of *Aérospatiale*-era jurisprudence. These cases allegedly extend the trend of cabining the extraterritorial application of US law into the realm of discovery. In *Daimler*, the Court urged future courts to consider international comity as a crucial concern, rather than as a formality to be fulfilled via a contrived balancing test. The other cases as well made international comity a prominent reason for refusing to hear cases implicating foreign interests.⁷⁹⁵

2.2.4.2 Positive comity

Whereas negative comity implies *restraint* in the assertion of jurisdiction in the interest of another jurisdiction, positive comity requires the *assertion* of it, on request of another jurisdiction.⁷⁹⁶

Positive comity, according to the OECD, implies that “a country should give full and sympathetic consideration to another country’s request that it open or expand a law enforcement proceeding in competition cases in order to remedy conduct in its territory that is substantially and adversely affecting another country’s interests. In addition, the requested country is urged to take whatever remedial action it deems appropriate on a voluntary basis and in consideration of its own legitimate interests.”⁷⁹⁷ This allows a particular problem to be dealt with by the authority best placed to do so.⁷⁹⁸ In other words, positive comity is an active courtesy process, in which the parties may request the application of the other party’s competition rules, following anti-competitive behaviour on that party’s territory, because it affects the important interests of the requesting party.⁷⁹⁹ Potential benefits include improved effectiveness and efficiency of proceedings,

⁷⁹³ D. Zambrano, “A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery”, *Berkeley Journal of International Law*, Vol. 34, No. 1, Spring 2016, 158, 163.

⁷⁹⁴ *Ibid.*, 160.

⁷⁹⁵ *Ibid.*, 157, 180, 184, 192, 201-202.

⁷⁹⁶ B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 184.

⁷⁹⁷ OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through ‘Positive Comity’ in Competition Law Enforcement, DAF/CLP(99)19, 14 June 1999, 2; also see OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Background Note, DAF/COMP/GF(2012)6, 13 February 2012, 5.

⁷⁹⁸ H. Dieckmann, “The Benefits of Cooperation between Competition Authorities”, Inaugural Symposium of the Competition Policy Research Center, Tokyo, 2003, available at <http://www.jftc.go.jp/cprc/DP/CPDP-9-E.pdf>, (accessed December 2011), 4.

⁷⁹⁹ Treaties Office Database, Summary of Treaty, Agreement between the European Communities and the Government of Canada regarding the application of their competition laws, available at <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=288> (accessed November 2011); UNCTAD, Experiences gained so far on international cooperation on competition policy issues and the mechanisms used, TD/B/COM.2/CLP/21/Rev.5, 17-19 July 2007, 7.

and a reduced need to share confidential information.⁸⁰⁰ According to the Commission, positive comity allows it to retain control of foreign enforcement procedures addressing anticompetitive behaviour that takes place within the EU and limits parallel investigations.⁸⁰¹

Positive comity should be distinguished from other forms of cooperation such as the taking of evidence in support of foreign proceedings, as provided for under the Hague Evidence Convention.⁸⁰² When a requested country engages in positive comity, the proceedings (investigating and possibly remedying anti-competitive conduct) are conducted by the requested country according to its own procedures. Investigatory assistance, however, involves support to the *requesting* country's enforcement action, according to the latter's procedures and rules.⁸⁰³ The main difference is therefore that in a case involving positive comity, the proceedings will take place according to the rules and instructions of the requested state, without interference by the requesting state. The responsibility for enforcement is transferred entirely to a foreign jurisdiction, although not in a definite or irreversible way.⁸⁰⁴

The term positive comity was first coined during the negotiations of the 1991 EU-US Agreement, but as with traditional comity, the underlying concept had existed for decades already.⁸⁰⁵ Worth mentioning in particular is the history of the concept in the context of the OECD Competition Committee. The original draft of the 1967 Recommendations did not call for positive comity, but did include a consultation requirement and a call for legislation authorising information sharing. Both requirements were left out of the second draft, however, and replaced by a type of positive comity provision, only to have it deleted again in the final version and substituted by a new provision, nodding towards positive comity, stating that “*early notification would permit the requesting country to ‘take account of ... such remedial action as the other Member may find it feasible to take under its own laws to deal with the restrictive practice’.*”⁸⁰⁶ The concept of positive comity was formally included in OECD recommendations in 1973 under the umbrella of ‘Consultation and Co-ordination’,⁸⁰⁷ and therefore

⁸⁰⁰ OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Background Note, DAF/COMP/GF(2012)6, 13 February 2012, 6.

⁸⁰¹ Communication from the Commission to the Council concerning the Agreement between the European Communities and the Government of the United States on the application of positive comity principles in the enforcement of their competition laws, COM(97) 233 final, 97/0178(CNS), 18 June 1997, 3.

⁸⁰² OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through ‘Positive Comity’ in Competition Law Enforcement, DAF/CLP(99)19, 14 June 1999, 3.

⁸⁰³ OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Background Note, DAF/COMP/GF(2012)6, 13 February 2012, 5.

⁸⁰⁴ J. Basedow, “Competition Policy in a Globalized Economy: from Extraterritorial Application to Harmonization” in M. Neumann & J. Weigand (eds), *The International Handbook of Competition*, Cheltenham, Edward Elgar Publishing, 2004, 327.

⁸⁰⁵ OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through ‘Positive Comity’ in Competition Law Enforcement, DAF/CLP(99)19, 14 June 1999, 2.

⁸⁰⁶ *Ibid.*, 8.

⁸⁰⁷ OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Background Note, DAF/COMP/GF(2012)6, 13 February 2012, 5. According to the OECD, the provision in its Recommendations was even stronger than the one in the EU-US Agreement. (OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through ‘Positive Comity’ in Competition Law Enforcement, DAF/CLP(99)19, 14 June 1999, 5) This should be nuanced, however. The OECD claimed that the recommendation requires that “*the requested country ‘should’ attempt to remedy any harm*” in contrast to the provision on positive comity of the 1991 EU-US Agreement that merely requires the consideration of the request. Considering the lack of binding effect of both provisions, however, there is no practical difference. (OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through ‘Positive Comity’ in Competition Law Enforcement, DAF/CLP(99)19, 14 June 1999, footnote 9) Moreover, where the provision of the 1991 EU-US Agreement comes

reflects a policy well-known to all OECD members since the early seventies.⁸⁰⁸ In the OECD Recommendations parties were to give ‘full and sympathetic consideration’ to positive comity requests, meaning that considerations that would always exist, such as the domestic nature of the target firms, are not valid causes for refusal. Resources do make up a relevant factor in deciding whether or not to accommodate a request. It was clarified, however that the cost for the requested country should be weighed against future savings and other benefits resulting from the reciprocal nature of positive comity, as well as the general benefits of more effective enforcement. Despite the voluntary nature of a positive comity request, already there were fears that the pressure to respond would take away resources from case investigations and upset domestic enforcement agendas.⁸⁰⁹

The reason why the concept attracted renewed attention in the 1991 EU-US Agreement is because it was the first time a positive comity provision was embedded in a modern bilateral agreement exclusively dedicated to competition law. The concept was moreover given a name, and the timing was right as well, as the relationship between competition law and market access was heavily discussed at the time.⁸¹⁰ MARSDEN believed that the concept of positive comity mainly arose to relieve the trade friction that resulted from allegations of market access barriers created by business practices. He explained that the late eighties and nineties were characterised by accusations that governments were not sufficiently committing to the enforcement of their competition laws, resulting in serious trade tensions.⁸¹¹ The OECD confirmed that positive comity is likely to be most successful in export restraint or market access cases.⁸¹² The strong link with trade is demonstrated again by the fact that in the ICPAC (International Competition Policy Advisory Committee) Report (see below, Part III, 2.1.4.1) positive comity is discussed in the chapter ‘Where trade and competition intersect’.⁸¹³ The concept gained renewed attention because it respected states’ sovereignty, while at the same time promoting an atypical form of cooperation.⁸¹⁴ It was believed to minimise inefficiencies from duplicative enforcement and maximise predictability and consistency.⁸¹⁵ Positive comity would be a preferable alternative for governments to the extraterritorial exercise of their jurisdiction.⁸¹⁶

into play when the requesting country’s interests are adversely affected, the OECD recommendation requires that they are both substantially and adversely affected.

⁸⁰⁸ OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through ‘Positive Comity’ in Competition Law Enforcement, DAF/CLP(99)19, 14 June 1999, 2.

⁸⁰⁹ OECD, International Co-operation – Stocktaking Exercise of the Competition Committee’s Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 8-9.

⁸¹⁰ OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through ‘Positive Comity’ in Competition Law Enforcement, DAF/CLP(99)19, 14 June 1999, 10; also see B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 186.

⁸¹¹ P. Marsden, “The curious incident of positive comity - the dog that didn’t bark (and the trade dogs that just might bite)” in A. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 305.

⁸¹² OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through ‘Positive Comity’ in Competition Law Enforcement, DAF/CLP(99)19, 14 June 1999, 14.

⁸¹³ International Competition Policy Advisory Committee Antitrust Division, ICPAC Final Report, 2000, available at <http://www.library.unt.edu/gpo/ICPAC/finalreport.htm> (accessed September 2015), Chapter 5. The ICPAC is an independent advisory committee comprised of legal, economic and business experts that was established by the DoJ in 1997 to consider international competition issues. OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 55.

⁸¹⁴ P. Marsden, “The curious incident of positive comity - the dog that didn’t bark (and the trade dogs that just might bite)” in A. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 304.

⁸¹⁵ OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through ‘Positive Comity’ in Competition Law Enforcement, DAF/CLP(99)19, 14 June 1999, 15.

⁸¹⁶ International Chamber of Commerce Policy Statement: “ICC Comments on EU-US Positive Comity Agreement, Law and Practices Relating to Competition”, 12 March 1997.

In order to address the practical problems resulting from extraterritorial jurisdiction as well as to eliminate the jurisdictional ‘imbalance’ resulting from the rather aggressive extraterritorial antitrust enforcement by the US, it was decided to further develop the positive comity provision in a supplement to the 1991 EU-US Agreement.⁸¹⁷ Apart from adding more flesh to the bones of the positive comity provision in the 1991 Agreement, it was believed that the importance of this additional agreement went beyond its specific terms by underscoring a strong commitment to cooperation.⁸¹⁸ In its preamble, the 1998 Agreement between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws clarifies that it further elaborates the principles of positive comity and its implementation to enhance the effectiveness of the 1991 Agreement. According to ZANETTIN the 1998 Agreement was intended to boost an instrument that was considered to be underused.⁸¹⁹ Another factor in the creation of the 1998 Agreement is the rather negative experience with the first formal referral under the 1991 Agreement. The 1998 Agreement seems to address some of the concerns raised during this occasion, such as timing and communication concerns (see below).⁸²⁰

The effect of the 1998 Positive Comity Agreement, like the 1991 EU-US Agreement, is constrained by the fact that nothing in the Agreement or its implementation “*shall be construed as prejudicing either Party's position on issues of competition law jurisdiction in the international context*”⁸²¹ and that nothing in the Agreement “*shall be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the laws, of the European Communities or the United States of America or of their respective Member States or states.*”⁸²² None of the parties therefore gain competences that they did not already have. Either party can moreover terminate the agreement with a 60 day notice.⁸²³

Mergers or concentrations are excluded entirely from the scope of the 1998 Agreement.⁸²⁴ This exclusion cannot be found in the 1991 Agreement, so the basic positive comity provision in that agreement seems to nevertheless allow the application of the principle on merger cases.⁸²⁵ The cause

⁸¹⁷ OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through ‘Positive Comity’ in Competition Law Enforcement, DAF/CLP(99)19, 14 June 1999, 4. Also see B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 192. Article VI 1998 EU-US Positive Comity Agreement: “*This Agreement shall supplement and be interpreted consistently with the 1991 Agreement, which remains fully in force.*” GERADIN, REYSEN and HENRY do call to nuance this statement: “*this assertion regarding the scope of each authority's exercise of jurisdiction is very much open to dispute, however, given the broad jurisdictional scope of the EU implementation doctrine [...]*.” D. Geradin, M. Reysen, & D. Henry, “Extraterritoriality, Comity, and Cooperation in EU Competition Law” in A. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 31, footnote 44. Also see Communication from the Commission to the Council concerning the Agreement between the European Communities and the Government of the United States on the application of positive comity principles in the enforcement of their competition laws, COM(97) 233 final, 97/0178(CNS), 18 June 1997, 2.

⁸¹⁸ OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through ‘Positive Comity’ in Competition Law Enforcement, DAF/CLP(99)19, 14 June 1999, 11, 16.

⁸¹⁹ B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 192.

⁸²⁰ International Competition Policy Advisory Committee Antitrust Division, ICPAC Final Report, 2000, available at <http://www.library.unt.edu/gpo/ICPAC/finalreport.htm> (accessed September 2015), Chapter 5.

⁸²¹ Preamble 1998 EU-US Positive Comity Agreement.

⁸²² Article VII 1998 EU-US Positive Comity Agreement. Article IX 1991 EU-US Agreement, Article XI EU-Canada Agreement, Article 10 EU-Japan Agreement, and Article 10 EU- Korea Agreement.

⁸²³ Article VIII 1998 EU-US Positive Comity Agreement.

⁸²⁴ Article II(4) 1998 EU-US Positive Comity Agreement.

⁸²⁵ Also see OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through ‘Positive Comity’ in Competition Law Enforcement, DAF/CLP(99)19, 14 June 1999, 10.

of the exclusion of merger proceedings in the 1998 Agreement can be found in the introduction in the latter agreement of a presumption of deferral or suspension (see below). If an authority were to defer in a merger case following a positive comity request, and discover only when the relevant deadline to act has passed that the requested party did not or could not remedy the anticompetitive effects of the merger within their jurisdiction, the consequences for that jurisdiction would be grave as it would have lost the opportunity to act entirely.⁸²⁶

Two conditions surround the application of the positive comity principle in the 1991 EU-US Agreement. The requesting party should convince the other party that its important interests are adversely affected by anticompetitive activities taking place for at least a substantial part in the territory of the latter, that are moreover impermissible under that party's competition laws. Only then does the 1998 Agreement apply.⁸²⁷ In such circumstances, a request containing specific information about the anticompetitive behaviour call for the initiation of enforcement activities, upon which the requested party may decide whether or not to accommodate, while keeping the requesting party informed. It is emphasised that both parties maintain full discretion with regard to whether or not to undertake enforcement activities with respect to the notified anticompetitive activities.⁸²⁸ Export cartels are often exempted from the competition rules of a nation, and will for this reason, regrettably, fall out of the reach of positive comity requests under the 1998 Agreement, an area where positive comity would have had a significant effect. The International Chamber of Commerce (ICC) rightly warned that such limitations may prevent the agreement from being effective in providing an alternative for the extraterritorial exercise of jurisdiction by competition authorities.⁸²⁹ It is clarified here, in contrast to the 1991 Agreement, that a party's interests are adversely affected when anticompetitive activities cause harm to either the ability of domestic firms to invest in, export to, or otherwise compete in the territory of the other Party or to competition in a Party's domestic or import markets.⁸³⁰

Article III contains the basic principle of positive comity under the 1998 Agreement. A request for enforcement action in accordance with the Requested Party's competition laws may be issued regardless of whether the activities are illegal according to the Requesting Party's competition laws, and regardless of whether the competition authorities of the Requesting Party have started or planned taking enforcement activities under their own competition laws. Article IV contains the core and major novelty of the 1998 Agreement, namely a presumption of deferral or suspension of enforcement activities of the Requesting Party in favour of enforcement activities by the competition authorities of the Requested Party. This deferral or suspension is subject to several conditions, relating to the impact of the anti-competitive activities at issue, the ability to fully and adequately address the adverse effects on the interests of the Requesting Party, and the engagement of the competition authorities of the Requested Party.⁸³¹ Most importantly, it is required that “[t]he

⁸²⁶ Communication from the Commission to the Council concerning the Agreement between the European Communities and the Government of the United States on the application of positive comity principles in the enforcement of their competition laws, COM(97) 233 final, 97/0178(CNS), 18 June 1997, 4.

⁸²⁷ Article I(1) 1998 EU-US Positive Comity Agreement.

⁸²⁸ Article V 1991 EU-US Agreement, Article V EU-Canada Agreement, Article 5 EU-Japan Agreement, and Article 6 EU-Korea Agreement.

⁸²⁹ International Chamber of Commerce Policy Statement: ICC Comments on EU-US Positive Comity Agreement, Law and Practices Relating to Competition, 12 March 1997.

⁸³⁰ Article II(1) 1998 EU-US Positive Comity Agreement.

⁸³¹ Article IV(2) 1998 EU-US Positive Comity Agreement: “(a) the anti-competitive activities at issue: (i) do not have a direct, substantial and reasonably foreseeable impact on consumers in the Requesting Party's territory; or

anticompetitive activities at issue: do not have a direct, substantial and reasonably foreseeable impact on consumers in the Requesting Party's territory, or where the anticompetitive activities do have such an impact on the Requesting Party's consumers, they occur principally in and are directed principally towards the other Party's territory."⁸³² These are similar requirements to those that play for the Sherman Act to be applicable (see above, Part I, 3.2.1). The Commission explained that such requirements, in particular those relating to the engagement of the competition authority in the requested party are necessary to create the required trust from the Requesting Party to defer or suspend action.⁸³³ When such conditions are satisfied, the Requesting Party can nevertheless choose not to defer or suspend its enforcement activities, but it is required to inform the competition authorities of the Requested Party of its reasons. It can, on the contrary, also decide to defer or suspend when not all conditions are fulfilled.⁸³⁴ Even when a requesting party has decided to defer or suspend, it can still initiate enforcement activities at a later stage, provided that, again, it notifies the competition authorities of the Requested Party of their intentions and reasons. If this should lead to parallel investigations, the competition authorities should, where appropriate, coordinate their investigations according to Article IV of the 1995 Agreement.⁸³⁵ This provision is particularly weak. The conditions do not really seem to matter, as the requesting authority may choose not to defer or suspend its enforcement activities even if the conditions are satisfied and may initiate or reinstitute independent enforcement proceedings later at any time, imposing its own penalties instead. There is no pressure at all to use the positive comity procedure instead of the exercise of extraterritorial jurisdiction. Meaningful implementation is made very difficult.⁸³⁶ Moreover, nothing is mentioned in the Agreement on notification to the companies being investigated.

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- (ii) where the anti-competitive activities do have such an impact on the Requesting Party's consumers, they occur principally in and are directed principally towards the other Party's territory;*
 - (b) the adverse effects on the interests of the Requesting Party can be and are likely to be fully and adequately investigated and, as appropriate, eliminated or adequately remedied pursuant to the laws, procedures, and available remedies of the Requested Party. The Parties recognise that it may be appropriate to pursue separate enforcement activities where anti-competitive activities affecting both territories justify the imposition of penalties within both jurisdictions; and*
 - (c) the competition authorities of the Requested Party agree that in conducting their own enforcement activities, they will:*
 - (i) devote adequate resources to investigate the anti-competitive activities and, where appropriate, promptly pursue adequate enforcement activities;*
 - (ii) use their best efforts to pursue all reasonably available sources of information, including such sources of information as may be suggested by the competition authorities of the Requesting Party;*
 - (iii) inform the competition authorities of the Requesting Party, on request or at reasonable intervals, of the status of their enforcement activities and intentions, and where appropriate provide to the competition authorities of the Requesting Party relevant confidential information if consent has been obtained from the source concerned. The use and disclosure of such information shall be governed by Article V;*
 - (iv) promptly notify the competition authorities of the Requesting Party of any change in their intentions with respect to investigation or enforcement;*
 - (v) use their best efforts to complete their investigation and to obtain a remedy or initiate proceedings within six months, or such other time as agreed to by the competition authorities of the Parties, of the deferral or suspension of enforcement activities by the competition authorities of the Requesting Party;*
 - (vi) fully inform the competition authorities of the Requesting Party of the results of their investigation, and take into account the views of the competition authorities of the Requesting Party, prior to any settlement, initiation of proceedings, adoption of remedies, or termination of the investigation; and*
 - (vii) comply with any reasonable request that may be made by the competition authorities of the Requesting Party."*

⁸³² Article IV(2)(a) 1998 EU-US Positive Comity Agreement.

⁸³³ Communication from the Commission to the Council concerning the Agreement between the European Communities and the Government of the United States on the application of positive comity principles in the enforcement of their competition laws, COM(97) 233 final, 97/0178(CNS), 18 June 1997, 7.

⁸³⁴ Article IV(3) 1998 EU-US Positive Comity Agreement.

⁸³⁵ Article IV(4) 1998 EU-US Positive Comity Agreement.

⁸³⁶ International Chamber of Commerce Policy Statement: ICC Comments on EU-US Positive Comity Agreement, Law and Practices Relating to Competition, 12 March 1997.

Only few documented examples exist of the use of the positive comity principle. In the 2012 OECD/ICN Joint Survey, just three agencies reported having made requests for assistance on the basis of the principle of positive comity.⁸³⁷ One publicly known example of informal use of positive comity between the European Commission and the US antitrust authorities is the *IRI/A.C. Nielsen* case in 1996, before the entry into force of the Positive Comity Agreement, revolving around abuse of dominance in the international market for retail tracking services.⁸³⁸ While both the European Commission and the DoJ initiated investigations into A.C. Nielsen's alleged anticompetitive behaviour following a complaint by IRI, the US, convinced that the EU had a firm intention to act, agreed to let the European Commission take the lead, as most of the alleged anticompetitive conduct occurred in Europe and affected European customers more, even if it also had an adverse effect on US exports and the main firms involved were American. Following negotiations, A.C. Nielsen finally undertook to change its practices, satisfying both the European Commission and the US DoJ.⁸³⁹ During the entire process, the Commission informed the DoJ and gave it the opportunity to comment. No formal request to act was issued in this case as the Commission had already started an investigation, but the US nevertheless waited for the results of the Commission's investigation and therefore the case is often mentioned as an informal example of the use of positive comity.⁸⁴⁰ It should be added that cooperation was made substantially easier by the waivers of confidentiality issued by the parties (see below, Part II, 4.1.1).⁸⁴¹

The only documented occasion of a formal positive comity request between the EU and the US to date is the *Sabre/Amadeus* case initiated in 1997, before the entry into force of the positive comity Agreement.⁸⁴² Central in this case was the alleged discrimination of US airlines by certain computerised reservation systems (Amadeus), set up by Lufthansa, Iberia, and Air France. The alleged anticompetitive behaviour mainly took place on European territory, while US firms were among the main victims. The US antitrust authorities requested the EU to take enforcement action.⁸⁴³ The EU finally opened a procedure against Air France for abuse of dominant position, resulting in a private settlement agreement between Sabre and Air France.⁸⁴⁴ The investigation of this

⁸³⁷ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 42-43.

⁸³⁸ For the facts of the case, see International Competition Policy Advisory Committee Antitrust Division, ICPAC Final Report, 2000, available at <http://www.library.unt.edu/gpo/ICPAC/finalreport.htm> (accessed September 2015), Chapter 5.

⁸³⁹ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 76; B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 189-190.

⁸⁴⁰ EC submission to the WTO Working Group on the Interaction Between Trade and Competition Policy, WT/WGTCP/W/129, 12 July 1999, as mentioned in P. Marsden, "The curious incident of positive comity - the dog that didn't bark (and the trade dogs that just might bite)" in A.T. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 303-304, footnote 5.

⁸⁴¹ B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 189-190.

⁸⁴² Also see E. Swaine, "Cooperation, Comity, and Competition Policy: United States" in A. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 17. For a detailed account of the facts of this case, see B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 188-189 and International Competition Policy Advisory Committee Antitrust Division, ICPAC Final Report, 2000, available at <http://www.library.unt.edu/gpo/ICPAC/finalreport.htm> (accessed September 2015), Chapter 5.

⁸⁴³ M. Blauburger, "The Governance of Overlapping Jurisdictions. How International Cooperation Enhances the Autonomy of Competition Authorities", Transtate Working Papers, No. 102, Bremen, 2009, 16-17.

⁸⁴⁴ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 77.

case by the European authorities took quite some time, almost three years start to end, while Article IV of the 1998 Agreement recommends a six month timeframe.⁸⁴⁵ This caused the US authorities to doubt the commitment of the EU to the investigation. KLEIN, Assistant Attorney General at the Antitrust Division of the DoJ at the time, in a speech in 1999 when the case was still pending, already stated that based on the Division's experience, this time frame would be unrealistic in most cases.⁸⁴⁶ The Judiciary Committee of the US Senate held several hearings evaluating the usefulness of positive comity. The matter got rather controversial when one member of Congress claimed that the EU investigation was started reluctantly, staffed inadequately, and dragged out interminably, even if the US antitrust authorities were not involved in this controversy, and condemned politically pressuring a foreign partner in a positive comity case.⁸⁴⁷ This case demonstrates that a great level of trust is needed between parties engaging in positive comity, even if they have developed rather similar competition systems.

The limited (documentation of) use stands in contrast with the excitement that revolved around the concept of positive comity when it re-emerged in the nineties. Several explanations were sought for this apparent paradox. Until 1995 it was thought that parties refrained from formally invoking the 1991 Agreement out of caution, considering the legal challenge to the Agreement (see below, Part II, 2.3.1).⁸⁴⁸ Others claim that there was simply no need for positive comity provisions. In the early days of the 1991 Agreement, the Commission explained the limited use by stating that in several cases under active investigation by the Commission, a formal request under Article V was unnecessary because the case was dealt with through cooperation.⁸⁴⁹ VAN BAEL equally labelled formal provisions on positive comity as 'an out-of-date concept' because many issues have been identified as raising comity questions, without the comity agreements having been invoked. A formal request under the comity provision is therefore unnecessary according to him if a case can be dealt with through cooperation. Moreover, (multinational) companies can now go directly to the jurisdiction in which they face an issue.⁸⁵⁰ It is certainly overly optimistic to claim that the inspiration coming from the positive comity provision in the 1991 Agreement has led to cooperation being so good that it made the activation of formal (positive or negative) comity procedures obsolete.⁸⁵¹ Moreover, if informal requests and other types of cooperation suffice, it certainly does not explain why the need was felt to conclude an agreement dedicated entirely to formal positive comity in 1998. It may, however, be so that the initiation of the Working Group on Trade and Competition within the WTO relieved some of the tension that was present at the time positive comity was re-introduced, as this gave trade and competition officials the opportunity to engage with each other more intensely and more frequently.

⁸⁴⁵ Article IV(c)(5) 1998 EU-US Positive Comity Agreement.

⁸⁴⁶ J. Klein, Statement before the Subcommittee on Antitrust, Business Rights, and Competition Committee on the Judiciary United States Senate concerning International Antitrust Enforcement, Washington D.C., 4 May 1999, 13.

⁸⁴⁷ B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 195.

⁸⁴⁸ "The legal certainty regarding the status of the Agreement enjoyed since its approval on 10 April 1995 has allowed the European Commission to pursue its efforts to cooperate with its US counterparts." Report from the Commission to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, 10 April 1995 to 30 June 1996, COM(96) 479 final, 8 October 1996, 2. Also see OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through 'Positive Comity' in Competition Law Enforcement, DAF/CLP(99)19, 14 June 1999, 11.

⁸⁴⁹ Report from the Commission to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, 10 April 1995 to 30 June 1996, COM(96) 479 final, 8 October 1996, 11.

⁸⁵⁰ I. Van Bael, *Due Process in competition proceedings*, Alphen aan den Rijn, Wolters Kluwer, 2011, 61-62.

⁸⁵¹ OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through 'Positive Comity' in Competition Law Enforcement, DAF/CLP(99)19, 14 June 1999, 11.

At the same time the overall development of competition laws and authorities globally may have increased company trust causing companies to address their complaints directly to the foreign agency.⁸⁵²

A more ‘negative’ factor could be that the most well-known examples of positive comity ‘were not exactly paragons of action’⁸⁵³ and the few cases in which it was employed were not ‘shining examples of its efficiency.’ Positive comity may therefore, relatively quickly, have been perceived to have limited value. The OECD described the experience with positive comity in bilateral agreements as ‘somewhat of a damp squib.’⁸⁵⁴

2.2.4.3 Limitations

Indeed, the main reasons for the limited use of both negative and positive comity principles seem to be their inherent limitations. Those include the voluntary nature of the principles, the need for advanced trust between the parties, the absence of a mechanism to ward off politicisation, and the legal conditioning. These arguments will now be further developed.

Characteristic of the comity principle is its inherently voluntary nature, even when embedded in a formal cooperation agreement. As rightly pointed out by GERADIN, REYSEN, and HENRY, the importance of a comity principle in a formal agreement is undermined by its lack of binding effect.⁸⁵⁵ While the incorporation of comity provisions in a binding agreement may more clearly offer the parties the possibility to employ the principle, the absence of even an obligation to motivate refusals does not even commit the parties to *consider* requests.⁸⁵⁶

The voluntary nature of the principle renders comity completely useless in situations where both parties believe that they have a predominant interest in a matter.⁸⁵⁷ This was clearly demonstrated by the infamous *Boeing/McDonnell Douglas* and *GE/Honeywell* merger cases (see above, Part I, 2.2.5). Some, for instance, claim that comity did not play a role in the *Boeing/McDonnell Douglas* merger.⁸⁵⁸

⁸⁵² P. Marsden, “The curious incident of positive comity - the dog that didn’t bark (and the trade dogs that just might bite)” in A. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 305, 307, 309. The infamous *Boeing/McDonnell Douglas* merger clash only happened after the conclusion of the cooperation agreement.

⁸⁵³ P. Marsden, “The curious incident of positive comity - the dog that didn’t bark (and the trade dogs that just might bite)” in A. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 307.

⁸⁵⁴ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 23.

⁸⁵⁵ D. Geradin, M. Reysen, & D. Henry, “Extraterritoriality, Comity, and Cooperation in EU Competition Law” in A. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 32.

⁸⁵⁶ Also see OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through ‘Positive Comity’ in Competition Law Enforcement, DAF/CLP(99)19, 14 June 1999, 7.

⁸⁵⁷ P. Marsden, “The curious incident of positive comity - the dog that didn’t bark (and the trade dogs that just might bite)” in A. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 309.

⁸⁵⁸ B. Peck, “Extraterritorial Application of Antitrust Laws and the U.S.-EU Dispute over the Boeing and McDonnell Douglas Merger: From Comity to Conflict? An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution”, *San Diego Law Review*, Vol. 35, 1998, 1169, 1193. Commission Decisions declaring a concentration compatible with the common market and the functioning of the EEA Agreement, Case No IV/M.877 - *Boeing/McDonnell Douglas*, 30 July 1997; Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney in the Matter of The Boeing Company/McDonnell Douglas Corporation, 9710051, 1 July 1997, expressing the sense of the House of Representatives regarding the interference of the European Commission in the merger of the Boeing Company and McDonnell Douglas; Mitchell, Alison, “Clinton Warns Europeans of Trade Complaint on Boeing Deal”, *The New York Times*, 18 July 1997.

However, it is not true that both parties did not take each other's interest into account, it is rather that both parties believed that their interests were of greater importance, and that they were most severely affected by the merger in question. In the context of the *Boeing/McDonnell Douglas* merger, then Director-General SCHAUB acknowledged that “*procedures of notification and consultation and the principles of traditional and positive comity allow us to bring out respective approaches closer in cases of common interest but there exists no mechanism for resolving conflicts in cases of substantial divergence of analysis.*”⁸⁵⁹ More recent examples include the *Oracle/Sun Microsystems* case, and the *Microsoft* case (see above, Part I, 2.2.5).⁸⁶⁰ Another example in the merger sphere is the *Sandoz/Ciba-Geigy* case. Both pharmaceutical giants wanted to merge and form a new company, Novartis. The merger was cleared by the EU, subject to certain conditions relating to licensing practices. The US, also investigating the case, was much more strict in its review. The FTC approved the merger, but subject to much heavier conditions. The FTC decision came only after the EU issued its decision, and it was criticised for not giving much consideration to the Commission's analysis and evaluation.⁸⁶¹ FOX in 2011 has pointed out that in cases involving significant US antitrust interests, there is not a single US court that has ever judged that the interests of another nation outweighed the US interests.⁸⁶² She therefore claimed that ‘comity’ was somewhat of a ‘throw away’ word.⁸⁶³ GERADIN, REYSEN and HENRY similarly asked “*whether comity has ever stopped EU or U.S. authorities, for example, from meddling in a transaction or taking issue with a certain line of conduct because the other party is better placed to deal with it.*”⁸⁶⁴ They concluded that comity is of little use in the event of a real conflict, because the authorities involved will very likely find an overriding interest in enforcement and disregard comity.⁸⁶⁵ The interests involved in such cases are balanced by actors that are not objective and lack clear criteria, namely the involved states

⁸⁵⁹ Schaub, Alexander, “International Co-operation in Antitrust matters: making the point in the wake of the Boeing/MDD proceedings”, *Competition Policy Newsletter*, No. 1, February 1998.

⁸⁶⁰ Commission Decision declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement, Case No COMP/M.5529 - Oracle/ Sun Microsystems, C(2010) 142 final, 21 January 2010; DoJ Press Release, “Antitrust Division Issues Statement on the European Commission's Decision Regarding the Proposed Transaction Between Oracle and Sun”, 09-1210, 9 November 2009; Commission Decision relating to a proceeding under Article 82 of the EC Treaty, Case COMP/C-3/37.792 Microsoft, C(2004)900 final, 24 March 2004; DoJ Press Release, “Assistant Attorney General for Antitrust, R Hewitt Pate, issues Statement on the EC's Decision in Its Microsoft Investigation”, 04-184, 24 March 2004; Murad, Ahmed, “Obama attacks Europe over technology protectionism”, *Financial Times*, 16 February 2015; Kanter, James & Scott, Mark, “Europe Challenges Google, Seeing Violations of Its Antitrust Law”, *The New York Times*, 15 April 2015; Robinson, Duncan, & Spiegel, Peter, “Concerns grow over EU rules targeting American Companies”, *Financial Times*, 26 July 2015; A. Ezrachi, “Sponge”, *Journal of Antitrust Enforcement*, Vol. 5, No. 1, 2017, 72.

⁸⁶¹ B. Peck, “Extraterritorial Application of Antitrust Laws and the U.S.-EU Dispute over the Boeing and McDonnell Douglas Merger: From Comity to Conflict? An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution”, *San Diego Law Review*, Vol. 35, 1998, 1189-1192.

⁸⁶² X., Contribution of Prof. Eleanor M. Fox in Summary of Antitrust Modernization Commission Hearing - International Antitrust Issues, 15 February 2006, http://www.americanbar.org/content/dam/aba/migrated/antitrust/at-links/pdf/at-mod/02_15_06.authcheckdam.pdf (accessed September 2015), 2. She repeated this statement later on: “[t]hrough all the years from the famous *Timberlane* case to the present, not one U.S. court has ever found that the interest of another nation outweighed the interest of the United States in cases in which the United States had an antitrust interest at stake.” E. Fox, “Antitrust Without Borders – From Roots to Codes to Networks” in A. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 269.

⁸⁶³ X., Contribution of Prof. Eleanor M. Fox in Summary of Antitrust Modernization Commission Hearing - International Antitrust Issues, 15 February 2006, http://www.americanbar.org/content/dam/aba/migrated/antitrust/at-links/pdf/at-mod/02_15_06.authcheckdam.pdf (accessed September 2015), 2.

⁸⁶⁴ D. Geradin, M. Reysen, & D. Henry, “Extraterritoriality, Comity, and Cooperation in EU Competition Law” in A. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 33.

⁸⁶⁵ *Ibid.*, 33-34, & footnote 60.

themselves.⁸⁶⁶ Moreover, as demonstrated by the developments in the case-law, comity has been further watered down to a principle that is only relevant when the conduct in question is compelled in the relevant third country.⁸⁶⁷

The *Intel* case serves as another example of the uncertainty that is inherent to the comity principle.⁸⁶⁸ Computer technology company AMD attempted to gain access to documents in private US antitrust proceedings via US courts in support of a complaint submitted to DG COMP. AMD had complained to the European Commission that Intel was abusing its dominant position in the micro-processing industry in the European market. To support its claim, it suggested that DG COMP should obtain the documents Intel had produced in a private antitrust suit in a US Federal Court (more precisely the documents produced to Intergraph Corporation in an action in the northern District of Alabama). DG COMP refused to do so, upon which AMD sought after the documents itself, relying on 28 USC §1782(a), a provision allowing, but not obliging, US federal district courts to provide assistance in obtaining evidence for use in proceedings before foreign and international tribunals.⁸⁶⁹ In this case such assistance would consist of ordering a resident company to produce a document under US discovery rules. The European Commission was free not to take the discovered documents into account, but nevertheless filed amicus curiae briefs to the effect of a dismissal of AMD's request.⁸⁷⁰ Lower courts in the US had been strongly divided on whether 28 USC §1782(a) included a 'foreign discoverability requirement'.⁸⁷¹ It was finally clarified by the US Supreme Court that §1782(a) does not require that the documents in question be subject to discovery in the foreign jurisdiction. It is therefore allowed, under certain conditions, to obtain discovery using US civil procedure in support of a complaint before the European Commission. The Court rejected a general foreign discoverability requirement, but listed four comity-based factors that the District Courts can use in assessing discovery requests under §1782. The Supreme Court first underlined the difference between evidence sought from a participant in a foreign proceeding and evidence sought from a non-participant. In the former case a foreign tribunal has jurisdiction and may order the production of evidence from those appearing before it. Secondly, the nature of the foreign tribunal, the character of the foreign proceedings, and the receptivity of the foreign government, court, or agency abroad to

⁸⁶⁶ B. Sweeney, "International Competition Law and Policy: A Work in Progress", *Melbourne Journal of International Law*, Vol. 10, 2009, 67.

⁸⁶⁷ D. Geradin, M. Reysen, & D. Henry, "Extraterritoriality, Comity, and Cooperation in EU Competition Law" in A. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 22.

⁸⁶⁸ *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

⁸⁶⁹ Since there is no obligation to provide assistance, decisions may be led by considerations of comity. C. Ryngaert, "Assessing international discovery after *Intel v AMD* (US Supreme Court, 2004): expanded US discovery opportunities for foreign litigants?", *European Business Organization Law Review*, Vol. 7, No. 3, 2006, 686.

⁸⁷⁰ C. Ryngaert, "Assessing international discovery after *Intel v AMD* (US Supreme Court, 2004): expanded US discovery opportunities for foreign litigants?", *European Business Organization Law Review*, Vol. 7, No. 3, 2006, 680.

⁸⁷¹ Opposite conclusions were reached on this point in the *Re: Vitamins* and *Re: Methionine* cases, which were characterised by similar facts and legal argumentation, and both revolved around class action plaintiffs seeking the production of documents produced to foreign antitrust authorities (in Canada and the EU) in the context of leniency applications. The Canadian Government and the European Commission both filed amicus curiae briefs opposing the production of the documents. Both the issue of production and the weight given to the issues raised by the amici curiae caused division. (C.S. Goldman, C. Hersch, C. L. Witterick, "International antitrust: developments after *Empagran* and *Intel* – comity considerations", American Bar Association Spring Meeting, 31 March 2005, 3, 11) Other circuit and district courts as well were divided on whether a party seeking judicial assistance under §1782(a) must show that the evidence sought is discoverable in the foreign jurisdiction or not. For an detailed account of the *Intel* saga, see M. Zalta, "Recent interpretation of 28 USC § 1782(A) by the Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*: the effects on federal district courts, domestic litigants, and foreign tribunals and litigants", *Pace International Law Review*, Vol. 17, No. 2, September 2005, 413-443.

US Federal Court judicial assistance should be taken into account. According to RYNGAERT the introduction of this factor indicates the weight that the Supreme Court attaches to international comity, as this consideration mitigates the impact of the Court's prior holding that the competition proceedings before the European Commission qualify as proceedings before a foreign tribunal for the purpose of §1782. The Court also called for 'suspicion' with regard to all §1782 requests aimed at circumventing foreign proof-gathering restrictions or other policies of a foreign country, as not to offend other nations. Finally, 'unduly intrusive or burdensome requests' ought to be trimmed or rejected. This factor may therefore be used to avoid fishing expeditions. In casu, the District Court reproached AMD for not having tailored its application to the subject matter of the complaint.⁸⁷²

ELHAUGE and GERADIN were rightly critical toward this judgment. According to them, it is unintelligible why litigants are allowed to obtain discovery in the US for use in a foreign proceeding when this would not be possible in a similar US litigation and is not permitted under the discovery rules of the foreign nation. This undermines the discovery limits imposed by the foreign nation, in particular when the foreign tribunal is not receptive to this type of 'assistance'.⁸⁷³ This case is indeed detrimental to the promotion of international cooperation and coordination in antitrust enforcement.⁸⁷⁴ Justice BREYER, an internationalist-minded Supreme Court Justice, forcefully dissented and underlined that this opinion ignored the opposition by the Commission to being labelled a 'tribunal' and therefore undermined comity.⁸⁷⁵ GOLDMAN, HERSH, and WITTERICK rightly claimed that "*there is a disconnect between some of the U.S. courts and policy-makers with regard to the types of international law and comity issues raised.*"⁸⁷⁶ This case was also decided rather differently than the earlier *Empagran* case, which appeared to restrict the role of US courts in the context of foreign antitrust proceedings (see above, Part I, 3.2.1), again resulting in uncertainty with regard to the effect of the comity principle.⁸⁷⁷ Strikingly, the EU-US agreements are the obvious absentee in this type of cases. It is remarkable how the agreements are not brought up either in the Commission's amicus curiae briefs nor in the judgments themselves. While admittedly these agreements relate to the working relationship between the competition agencies of both jurisdictions, they are nevertheless testimony to a certain relationship among the parties, and the intentions of aiming to achieve a mutually beneficial relationship. While the judiciary should evidently remain independent it would be beneficial to explicitly take the broader working relationship between the competition authorities and the agreements concluded in this regard into account.

When it comes to positive comity it is very difficult to assess, without objective criteria at hand, when one nation should defer because another nation has a greater interest and therefore a greater claim of right.⁸⁷⁸ The only guidance offered in this regard by the 1998 Agreement is that a nation should 'normally' defer or suspend if the anti-competitive activities at issue "*(i) do not have a direct, substantial*

⁸⁷² C. Ryngaert, "Assessing international discovery after *Intel v AMD* (US Supreme Court, 2004): expanded US discovery opportunities for foreign litigants?", *European Business Organization Law Review*, Vol. 7, No. 3, 2006, 689, 693.

⁸⁷³ E. Elhauge & D. Geradin, , *Global Competition Law and Economics*, 2nd ed., Oxford and Portland Oregon, Hart Publishing, 2011, 1238-1239.

⁸⁷⁴ C.S. Goldman, C. Hersh, C. L. Witterick, "International antitrust: developments after *Empagran* and *Intel* – comity considerations", American Bar Association Spring Meeting, 31 March 2005, 16.

⁸⁷⁵ C. Ryngaert, "Assessing international discovery after *Intel v AMD* (US Supreme Court, 2004): expanded US discovery opportunities for foreign litigants?", *European Business Organization Law Review*, Vol. 7, No. 3, 2006, 685.

⁸⁷⁶ C.S. Goldman, C. Hersh, C. L. Witterick, "International antitrust: developments after *Empagran* and *Intel* – comity considerations", American Bar Association Spring Meeting, March 31, 2005, 16.

⁸⁷⁷ *Ibid.*, 1, 14.

⁸⁷⁸ E. Fox, "Antitrust Without Borders – From Roots to Codes to Networks" in A. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 268.

and reasonably foreseeable impact on consumers in the Requesting Party's territory; or (ii) where the anti-competitive activities do have such an impact on the Requesting Party's consumers, they occur principally in and are directed principally towards the other Party's territory.”⁸⁷⁹ According to the OECD, the latter requirement is the main cause of uncertainty.⁸⁸⁰ In addition, it is often said that courts lack the expertise to accurately take into account foreign interests due to most domestic judges’ lack of experience with foreign laws or international law. Lack of guidance in this regard contributed to the fact that courts often found US interests that outweighed those of other nations, even if the latter were substantial. ZAMBRANO in this context promoted government input via letters and amici, because the latter allegedly are better equipped than courts to evaluate the interests of the nation, which was also underlined by Justice BLACKMAN in his *Aérospatiale* dissent. Courts are not designed to exchange, negotiate, and reconcile the problems accompanying the realisation of national interests within the sphere of international association.⁸⁸¹ However, this again opens the gates for politicisation (see below) and may endanger the separation of powers.

The reasoning ‘in the books’ underpinning positive comity is that it allows a case to be dealt with by the authority best placed to do so. In practice, authorities engage in cooperation because they expect to reciprocally benefit from cooperation in another case. This adds to the difficulty of deciding when to answer to, or make, a comity request.⁸⁸² Shortly after the conclusion of the 1991 Agreement, ATWOOD already warned that the principle of positive comity could not overcome the proposition that laws are written and enforced with the protection of national interests in mind.⁸⁸³ Similarly, PECK wondered whether the EU-US Agreement, revolving around the positive comity concept could continue to be a viable framework for resolving antitrust jurisdiction disputes, considering that nations will protect their own economic interests.⁸⁸⁴

Positive comity was strongly supported in the early days because it was respectful of participating countries’ sovereignty, as the country whose market is most directly affected is given principal enforcement responsibility. The OECD underlined in this context that the main issue in this context of voluntary cooperation is trust, more so than the text of an agreement.⁸⁸⁵ One could rightfully claim that the level of trust needed to engage in allocative positive comity (i.e. when there is deferral by one authority for the benefit of another) is even greater than that required for the exchange of

⁸⁷⁹ Article IV(2) 1998 EU-US Positive Comity Agreement.

⁸⁸⁰ OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through ‘Positive Comity’ in Competition Law Enforcement, DAF/CLP(99)19, 14 June 1999, 15. The following example is provided: “If firms in Country X fix prices on a product, for example, it is unclear whether their conduct will be said to be aimed principally at Country X unless for some reason the geographic market for the product is Country X. But if Country X is a separate market, one would not expect the conduct to harm consumers in any other country. In addition to such issues relating to market definition, it is noteworthy that the phrase ‘aimed principally towards’ reads somewhat like a ‘purpose’ test, though it seems unlikely that purpose will prove to be the sole or even the main criterion.”

⁸⁸¹ D. Zambrano, “A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery”, *Berkeley Journal of International Law*, Vol. 34, No. 1, Spring 2016, 176-177, 199-200, 211.

⁸⁸² A. Klevorick & A. Sykes, “United States Courts and the Optimal Deterrence of International Cartels: a Welfarist Perspective on Empagran” in E. Fox & D. Crane (eds), *Antitrust stories*, New York, Foundation Press, 2007, 388.

⁸⁸³ J. Atwood, “Positive Comity: is it a positive step?” in B. Hawk (ed.), *1992 Annual Proceedings of the Fordham Corporate Law Institute International Antitrust Law and Policy Conference*, Fordham Corporate Law institute, New York, Juris Publishing, 1993, 86.

⁸⁸⁴ B. Peck, “Extraterritorial Application of Antitrust Laws and the U.S.-EU Dispute over the Boeing and McDonnell Douglas Merger: From Comity to Conflict? An Argument for a Binding International Agreement on Antitrust Enforcement and Dispute Resolution”, *San Diego Law Review*, Vol. 35, 1998, 1170.

⁸⁸⁵ OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through ‘Positive Comity’ in Competition Law Enforcement, DAF/CLP(99)19, 14 June 1999, 16.

confidential information, the latter being an enormous hurdle for competition cooperation that is only now slowly being overcome. In her speech ‘is cooperation possible’ in 1999, WOOD referred to positive comity as ‘the milder cousin’ of cooperation.⁸⁸⁶ But is it truly a milder cousin? Allocative positive comity goes beyond toleration, notification, and some forms of cooperation. It requires complete trust in the enforcement action of a foreign jurisdiction and in a foreign agency’s legal tools, resources, and independence.⁸⁸⁷ It is paradoxical that as a party to the 1998 Positive Comity Agreement, foreseeing a presumption of deferral, LOWE, former Director-General of DG Competition, said during the 2008 Annual Fordham Competition Law Conference on International Antitrust Law and Policy that although the US and the EU work together, they would not even consider deference of one authority to another.⁸⁸⁸

Politicisation is another risk linked to (positive) comity cases, as demonstrated by the aforementioned *Sabre/Amadeus* and *Boeing/McDonnell Douglas* cases. Such headline-generating transactions attract political scrutiny, as they involve the engagement of time and resources for the benefit of (companies in) another jurisdiction, or may concern for instance the enforcement of domestic laws against a national champion, which may cause apprehension in the public opinion or with the political authorities. In particular media and aviation transactions, and later the high tech industry are among the most likely to receive intense scrutiny.⁸⁸⁹ This might discourage antitrust enforcers to engage in comity for fear of attracting too much political attention.⁸⁹⁰ Politics can also have an influence in another manner. The *GE/Honeywell* transaction for instance was announced just before the 2000 presidential elections in the US, while the review took place during the transition to a new administration. This led to the situation that there was no Assistant Attorney General in charge of the Antitrust Division until June 2001, which according to STERN impacted the handling of the case.⁸⁹¹

Some problems surrounding formal positive comity requests have to do with the legal conditioning of the concept. A determinant and logical factor in the application of the principle is the requirement that the behaviour at stake should be illegal under the laws of the requested party. Significant substantive differences between national competition laws may therefore severely limit the potential use of positive comity. The EU and the US remain in disagreement on what constitutes anticompetitive behaviour, in particular with regard to dominance or vertical restraints.⁸⁹² ZANETTIN demonstrated via a comparative analysis of EU-US and US-Japan cooperation that similar competition policies form a precondition for an effective use of positive comity.⁸⁹³ This is likely the case among partners to a cooperation agreement, but experience has shown that even under such

⁸⁸⁶ D. Wood, “Is cooperation possible?”, Luncheon Speech, *New England Law Review*, Vol. 34, No. 1, 108.

⁸⁸⁷ P. Marsden, “The curious incident of positive comity - the dog that didn’t bark (and the trade dogs that just might bite)” in A. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 303; OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through ‘Positive Comity’ in Competition Law Enforcement, DAF/CLP(99)19, 14 June 1999, 12.

⁸⁸⁸ B. Hawk, *2008 Competition Law Institute International Antitrust Law & Policy*, Fordham University School of Law, New York, Juris Publishing, 2009, 339.

⁸⁸⁹ R. Stern, “An in-house perspective on global competition law developments”, *Concurrences*, N°2-2012, 3.

⁸⁹⁰ B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 195-196.

⁸⁹¹ R. Stern, “An in-house perspective on global competition law developments”, *Concurrences*, N°2-2012, 3.

⁸⁹² P. Marsden, “The curious incident of positive comity - the dog that didn’t bark (and the trade dogs that just might bite)” in A. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 307-308.

⁸⁹³ He specified, though, that even more than substantial similarity of laws, the level of enforcement will be determinant for cooperation in general. B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 198.

conditions the use of the concept is limited. A consequence of the conditions surrounding allocative positive comity, is that it will only occur when the requesting jurisdiction faces severe difficulties in bringing a claim or successfully investigating a case itself. Whenever the requesting country does have the jurisdiction and means to enforce, it will likely want to impose its own fines or other remedies.⁸⁹⁴ This was implicitly confirmed in a speech by Assistant Attorney General KLEIN in 1999,⁸⁹⁵ who also acknowledged that positive comity lacked the practicality that would allow it to be used frequently.⁸⁹⁶

The International Competition Policy Advisory Committee, in its report issued two years after the entry into force of the 1998 Agreement, suggested that the amelioration of the procedural aspects of the process could address some of the challenges faced by the positive comity principle, for instance by requiring ‘a realistic assessment’ at the start of an investigation of the resources of the requested party or the establishment of a timetable for processing the referral.⁸⁹⁷ None of these suggestions, however, seem to have received any follow-up or would make a big difference for that matter, as they would seemingly only complicate the process. The ideas moreover remained general, and were not detailed suggestions for improvement. For instance, it is unclear who would assess the resources of the requested party. If it is the requested party itself, hidden agenda’s might influence the objective nature of the assessment. If it is the requesting party, it remains to be seen whether the agency would want to spend time and own resources doing such a thing.

In 2006 the US AMC held a hearing to obtain testimony on international antitrust issues, including on ways to foster comity between antitrust agencies.⁸⁹⁸ The 2007 Report and Recommendations of the AMC concluded, despite the limitations identified above and previous attempts at refining the concept, that the US should pursue more international agreements incorporating comity principles, while at the same time making greater use of the already existing comity provisions.⁸⁹⁹ These objectives seem to clash with past experience and appear detached from reality. The 2014 OECD Recommendation concerning International Cooperation on Competition Investigations and Proceedings, finally, also continued to mention the negative and positive comity principle, without, however, including a presumption of referral.⁹⁰⁰ This relentless promotion of comity principles makes one wonder whether the principle is much more successful than appears from the abovementioned available data. If so, agencies are strongly encouraged to share their positive experiences with the larger public.

⁸⁹⁴ OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through ‘Positive Comity’ in Competition Law Enforcement, DAF/CLP(99)19, 14 June 1999, 5, 15.

⁸⁹⁵ “*It should be kept in mind that, while we always reserve the right to initiate or resume our own investigation, there may well have been limitations on our own authority or practical ability to pursue the matter that led us to make the referral in the first place.*” J. Klein, Statement before the Subcommittee on Antitrust, Business Rights, and Competition Committee on the Judiciary United States Senate concerning International Antitrust Enforcement, Washington D.C., 4 May 1999, 14.

⁸⁹⁶ J. Klein, Statement before the Subcommittee on Antitrust, Business Rights, and Competition Committee on the Judiciary United States Senate concerning International Antitrust Enforcement, Washington D.C., 4 May 1999, 15.

⁸⁹⁷ International Competition Policy Advisory Committee Antitrust Division, ICPAC Final Report, 2000, available at <http://www.library.unt.edu/gpo/ICPAC/finalreport.htm> (accessed September 2015), Chapter 5, 239.

⁸⁹⁸ Summary of Antitrust Modernization Commission Hearing - International Antitrust Issues, 15 February 2006, available at http://www.americanbar.org/content/dam/aba/migrated/antitrust/at-links/pdf/at-mod/02_15_06.authcheckdam.pdf (accessed September 2015), 1.

⁸⁹⁹ D. Garza, J. Yarowsky, B. Burchfield, W. S. Cannon, D. Carlton, M. Delrahim, J. Jacobson, D. Kempf, Jr., S. Litvack, J. Shenefield, D. Valentine, J. Warden, *Antitrust Modernization Commission - Report and Recommendations*, April 2007, available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (accessed May 2015), 221.

⁹⁰⁰ OECD, Recommendation of the OECD Council Concerning International Co-operation on Competition Investigations and Proceedings, C(2014)108, 16 September 2014, Article III & IV.

Six years after the positive comity agreement with the EU, and despite its limited track record, the US entered into a similar agreement with Canada in 2004, to enhance the effectiveness of the competition cooperation agreement between the two nations in 1995.⁹⁰¹ The Agreement is similarly careful not to prejudice either party's position on issues of competition law jurisdiction in the international context.⁹⁰² While the scope of application of the agreement is limited to activities that may be subject to penalties or relief under the competition laws of the requested party, the comity provisions themselves are identical.⁹⁰³ This agreement is the only other competition-specific positive comity agreement in place, apart from the EU-US Agreement. No similar agreements have been concluded by the EU.

One could finally wonder whether, comity being a general concept not confined to competition law, its flaws are common too, or whether they are specific to the field of antitrust. There are indications that not only in the context of competition law little use is made of positive comity, also Article XVIII of the 1954 Friendship, Commerce, and Navigation Treaty between Germany and the United States reportedly had little practical effect, as well as the comity provision in the Treaty Establishing the Benelux Economic Union and similar provisions in bilateral cooperation agreements between the US and Denmark, France, Greece, Italy, and Japan.⁹⁰⁴

2.2.5 Consultation

Finally, the parties to the 1991 EU-US Agreement are required to consult with one another at appropriate levels upon motivated request regarding any matter related to the agreement. Such a request should indicate applicable time limits or other considerations urging speed. Parties should moreover attempt to conclude such consultations quickly, with the intention to reach mutually satisfactory conclusions. Such consultations should take place in a demonstrable spirit of cooperation.⁹⁰⁵

It is not entirely clear what the scope is of these meetings. 'Regarding any matter related to the agreement', is very broad, and seems to imply that it can relate to the implementation of the agreement as such, as well as particular cases dealt with under the Agreement. Possibly, non-urgent matters will be dealt with during the biannual meeting of officials under Article III(2), where current enforcement activities and priorities, economic sectors of common interest, considered policy changes and other matters of mutual interest relating to the application of competition laws can be discussed. The Commission indicated in the early years of the agreement that many contacts took place during which priorities with regard to effective enforcement and cooperation on specific cases

⁹⁰¹ Agreement between the Government of the United States of America and the Government of Canada on the application of positive comity principles to the enforcement of their competition laws, Washington, 5 October 2004 (2004 US-Canada Positive Comity Agreement).

⁹⁰² Preamble and Article VII 2004 US-Canada Positive Comity Agreement.

⁹⁰³ Article I(1)(b) 2004 US-Canada Positive Comity Agreement.

⁹⁰⁴ OECD, Report of the Committee on Competition Law and Policy – Making International Markets More Efficient through 'Positive Comity' in Competition Law Enforcement, DAF/CLP(99)19, 14 June 1999, 8; International Competition Policy Advisory Committee Antitrust Division, ICPAC Final Report, 2000, available at <http://www.library.unt.edu/gpo/ICPAC/finalreport.htm> (accessed September 2015), Chapter 5. Extensive research of this matter does not, however, fit within the scope of this study.

⁹⁰⁵ Article VII 1991 EU-US Agreement.

were discussed.⁹⁰⁶ While understandable in terms of the administrative burden this would bring along, it is nevertheless regrettable that the level of transparency regarding these meetings is low.

2.2.6 Best Practices on Cooperation in Merger Investigations

The difficulties encountered during the *GE-Honeywell* transaction in 2001 served as a catalyst for deepening merger cooperation between the EU and the US, resulting in a set of best practices for coordinating merger investigations in 2002. These best practices mainly memorialized practices that had been in place, while also making them more transparent.⁹⁰⁷ The Best Practices of 2002 and the review in 2011 consist of the same five sections, relating to the objectives of cooperation, communication between reviewing agencies, coordination on timing, the collection and evaluation of evidence, and remedies and settlements. There are no radical differences between the 2002 and 2011 Best Practices. The latter build on the former based on additional experience, but adhere to the same principles.

The 2011 Best Practices contain a lot of detail, and mention many practical examples of where certain forms of cooperation would be particularly useful. The objectives are clarified in detail and it offers hands-on guidance. The Best Practices moreover repeatedly address the role of the merging parties themselves in ensuring an effective and efficient investigation and on various occasions make explicit the benefits of cooperation for both agencies and parties. Emphasis throughout the document is on the exchange of information and coordination of timing to allow for meaningful discussion at key stages of the investigation, tailored to the needs of the case.

2.3 Legal nature

2.3.1 Legal basis of first generation agreements and procedure of conclusion

There was some confusion as to the nature of the EU-US Agreement at the time of its conclusion. The Agreement was originally concluded in 1991 between the European Commission and the government of the United States of America. While there was no Treaty basis for doing so, the Commission had a longstanding practice of concluding agreements with third countries, covering a variety of policy fields.⁹⁰⁸ Common characteristics were the creation of limited obligations only engaging the Commission, absence of financial commitments that could affect the budget of the Community, and a mere theoretical possibility that breach of the agreement would result in

⁹⁰⁶ European Commission, Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules – Report of the Group of Experts, COM(95)359 final, 12 July 1995.

⁹⁰⁷ H.R. Pate, “Antitrust enforcement at the United States Department of Justice: issues in merger investigations and litigation”, *Milton Handler Annual Antitrust Review*, 2002, 418.

⁹⁰⁸ For instance the voluntary export restraint agreement concluded between the European Commission and Japan’s Ministry of International Trade and Industry (EC-MITI Agreement). The Advocate General explicitly mentioned that “[...] it must be acknowledged that the Commission has brought into being acts in the nature of agreements in other fields as well. Agreements have been concluded on the subject of the privileges and immunities of diplomatic missions, on economic relations with countries belonging to the General Agreement on Tariffs and Trade and on technical matters, in particular in the field of plant health protection and scientific and technological cooperation.” He did add that “In its pleadings, the Commission had referred in particular to 25 instances of bilateral cooperation with non-member countries, all of which were subsequent to 1974. However, only the contested Agreement was formally designated as an agreement. On other occasions, the designation has varied: exchange of letters (18), memorandum of understanding (two), administrative understanding (three), agreed minute (one). No fewer than eight of those agreements were concluded with the United States, some directly with the Government, others with specific departments.” Opinion of Advocate General Tesouro in *French Republic v Commission of the European Communities*, C-327/91, EU:C:1993:941, 28, footnote 27.

international liability of the Community, as breach would result first and foremost in the extinction of the agreement. It can be assumed that the Commission expected that the agreement with the US would equally fall within this format. To this end, it rejected for instance the inclusion of an arbitration provision foreseeing the binding resolution of conflicts between the two parties by an independent arbitrator. Such a clause had never been included in an administrative agreement and would have constituted a limitation of the discretion of the Commission.⁹⁰⁹

The conclusion of this type of ‘administrative agreement’ by the Commission was characterised by a large degree of institutional uncertainty and the absence of normative involvement. An intervention by the Court was therefore of great significance.⁹¹⁰ It was France (supported by Spain and the Netherlands) that challenged the competence of the Commission to enter into the agreement. The main point of discussion was whether the EU-US Agreement should be considered a binding international agreement or rather an ‘administrative agreement’ as contended by the Commission. If the Agreement were a full-fledged international treaty, this would imply that the Commission did not have the authority to conclude the Agreement according to Article 210 and Article 228(1) of the EEC Treaty at the time, which reserved the capacity to bind the Community internationally to the Community itself, having legal personality.⁹¹¹ The term ‘agreement’ in these provisions represents “*any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation*”, as established by the Court in its Opinion 1/75.⁹¹²

There are some reasons why France decided to challenge this agreement in particular, even though the practice of the Commission existed before. One reason related to the content of the EU-US Agreement, which, according to BARONCINI, was different from previously concluded administrative agreements and represented a genuine foreign policy orientation, and therefore a decision that should have been made by the Council even when the execution would be the sole competence of the Commission and would not imply any legislative or financial changes for the Community. The French government further observed that due to the similarities with traditional mutual legal assistance agreements (see below, Part II, 4.2.3) the Agreement could not be considered to be purely ‘administrative’ and the Commission could not be the one holding the competence to make such commitments. There was more generally a climate of fear surrounding the Agreement, relating inter alia to the presumption that the Commission would share substantial amounts of information with the US authorities without receiving the same advantage in return and without sufficient safeguards in place for the protection of confidential information.⁹¹³ TORREMANS warned that “[o]ne should [...] not under-estimate the political change and the risk which is involved when the United States authorities become effectively one of the players that determine the direction in which European competition policy is being developed and how it is being applied. All this would give an external party a much bigger influence in European matters than was the case ever before.”⁹¹⁴ Moreover, Bloomberg BNA published an article entitled ‘European Lawyers

⁹⁰⁹ E. Baroncini, “La Cour de justice et le treaty making power de la Commission européenne depuis l’Accord de coopération dans l’application des régimes antitrust jusqu’à l’Accord sur les orientations en matière de coopération normative et de transparence”, *Revue du Droit de l’Union Européenne*, No. 2, 2006, 381-382.

⁹¹⁰ Ibid., 374.

⁹¹¹ Judgment of 9 August 1994, *French Republic v Commission of the European Communities*, C-327/91, EU:C:1994:305, paragraph 19-24.

⁹¹² Ibid., paragraph 27.

⁹¹³ E. Baroncini, “La Cour de justice et le treaty making power de la Commission européenne depuis l’Accord de coopération dans l’application des régimes antitrust jusqu’à l’Accord sur les orientations en matière de coopération normative et de transparence”, *Revue du Droit de l’Union Européenne*, No. 2, 2006, 384-386, 390.

⁹¹⁴ P. Torremans, “Extraterritorial application of E.C. and U.S. competition law”, *European Law Review*, Vol. 21, No. 4, 1996, 292.

Predict Negative Impact on business Sector From New U.S./EC Accord', illustrating the atmosphere of the time.⁹¹⁵ Finally, the political climate offered fertile ground for France's claim. The atmosphere was particularly tense when it came to the Commission's behaviour on the international scene following the uproar regarding the Blair House Agreement in the Uruguay Round.⁹¹⁶ This clash between member states (France in particular) and the Commission led to a systematic mistrust and resulted in less 'generous' and less flexible negotiating mandates being issued by the Council and in increased scrutiny of the Commission's negotiations with third countries.⁹¹⁷ Some member states feared that they would lose further control to the Commission over the development of competition rules if this agreement was left unchallenged. Implied was the further worry that the Commission could then give up the European Communities' control over their competition law system to the US, by overly relying on US guidance.⁹¹⁸

The Commission's main argument in support of its claim that the Agreement was not a binding international agreement but an administrative agreement, was that failure to adhere to the Agreement would not result in international liability, but mere termination of the Agreement. It furthermore pointed to Article IX, which prevented the Agreement from requiring any changes to national laws or inconsistent interpretations with those laws.⁹¹⁹ Article 228(1) EEC Treaty proscribed: "*Where this Treaty provides for the conclusion of agreements between the Community and one or more States or an international organization, such agreements shall be negotiated by the Commission. Subject to the powers vested in the Commission in this field, such agreements shall be concluded by the Council, after consulting the European Parliament where required by this Treaty.*"⁹²⁰ France maintained that such 'powers vested in the Commission' were limited to agreements to be concluded by the Commission for the recognition of Community laissez-passer,⁹²¹ or, indeed, the conclusion of administrative or working agreements.⁹²² The Commission, however, relying on the French text of the Article, claimed that the exception in Article 228 EEC Treaty should not be interpreted in a restrictive manner, and allowed the Commission to derive its powers from sources other than the Treaty, such as the practices followed by the institutions.⁹²³ Indeed, the Commission argued that, with regard to the establishment of its competence to conclude international agreements, in addition to the hypotheses set out in the sources of primary EU law, the practice of the institutions, coupled with the practice interpreting Article 228 EC, gave rise to an application based on which it would be able to conclude agreements the execution of which did not require intervention by the Council nor interference by the latter.⁹²⁴

⁹¹⁵ *Antitrust & Trade Regulation Report (BNA)*, Vol. 61, 26 September 1991.

⁹¹⁶ OECD Glossary of Statistical Terms, available at <https://stats.oecd.org/glossary/detail.asp?ID=222> (accessed June 2017).

⁹¹⁷ E. Baroncini, "La Cour de justice et le treaty making power de la Commission européenne depuis l'Accord de coopération dans l'application des régimes antitrust jusqu'à l'Accord sur les orientations en matière de coopération normative et de transparence", *Revue du Droit de l'Union Européenne*, No. 2, 2006, 384-386, 390.

⁹¹⁸ T. Baks, "Case 327/91, France v. Commission: establishing a balance between Community institutions", *Boston University International Law Journal*, Vol. 15, 1997, 252, 256.

⁹¹⁹ Judgment of 9 August 1994, *French Republic v Commission of the European Communities*, C-327/91, EU:C:1994:305, paragraph 21-22.

⁹²⁰ Emphasis by author.

⁹²¹ Judgment of 9 August 1994, *French Republic v Commission of the European Communities*, C-327/91, EU:C:1994:305, paragraph 29, referring to Article 7 of the Protocol on the Privileges and Immunities of the European Communities.

⁹²² *Ibid.*, providing as an example the establishment of relations with the organs of the United Nations or other international organizations.

⁹²³ *Ibid.*, paragraph 31.

⁹²⁴ E. Baroncini, "La Cour de justice et le treaty making power de la Commission européenne depuis l'Accord de coopération dans l'application des régimes antitrust jusqu'à l'Accord sur les orientations en matière de coopération normative et de transparence", *Revue du Droit de l'Union Européenne*, No. 2, 2006, 383.

Advocate General TESAURO emphasised the origins of the EU-US agreement. He first referred to the OECD initiatives in the field of international cooperation and the ensuing call from the Commission for more ambitious objectives following changes in the international economy, in particular the need for a legally binding document. The Advocate General was of the opinion that the agreement did not differ from a normal international agreement, taking into account its designation as ‘agreement’ and the parties that have concluded it. He then focused on the identity of the addressees, the will of the contracting parties, the content of the agreement and the absence or presence of penalties in the event of non-compliance. The Advocate General pointed to the fact that while the Commission is expressly referred to as a party, certain provisions of the agreement, for example those referring to ‘the party’s territory’, or ‘the party’s States or Member States’, clarify that it was in fact the Community that had committed itself internationally. With regard to the will of the parties to bind themselves, he recalled that the Commission itself expressed the intent to go beyond the OECD recommendations via the conclusion of a legally binding act. Finally, according to the Advocate General, the obligations set out in the Agreement could be qualified as instrumental and procedural obligations that are binding on the parties, while the provision providing for the revocation of the Agreement is also characteristic of a binding international agreement governed by international law.⁹²⁵

The Advocate General furthermore pointed out that so-called ‘administrative arrangements’ are in fact unknown in international law, where the only distinction involves binding versus non-binding agreements, the latter category generally consisting of gentlemen’s agreements or understandings.⁹²⁶ Arrangements brought into being by specific administrative entities with a view to establishing forms of cooperation with the authorities of other States having similar powers are not international agreements, as they are concluded by bodies lacking power to bind the State effectively at international level. Such arrangements are tolerated, but are not governed by international law, as such arrangements amount to mere concerted practices between authorities which act in the exercise of their discretion.⁹²⁷

The Court, like the Advocate General, opined that the Agreement was intended to produce legal effects and does so in practice. This conclusion was drawn from the wording of the Agreement, as well as its context of conclusion.⁹²⁸ The Court examined the Agreement in the light of the definition of an international agreement as described by Article 2(1)(a)(i) of the Vienna Convention of 21 March 1986 on the Law of Treaties between States and International Organizations or between International Organizations, even though the EU in itself is not a party to that Agreement.⁹²⁹ It concluded that because the Agreement produced legal effects and matched the definition of the Convention, the Community at the time could incur liability at international level in the event of non-performance of the Agreement. The Commission therefore overstepped its boundaries, as practice cannot override the provisions of the Treaty and even though the Commission has the

⁹²⁵ Opinion of Advocate General Tesauro in *French Republic v Commission of the European Communities*, C-327/91, EU:C:1993:941, paragraph 3, 18-21.

⁹²⁶ *Ibid.*, paragraph 22.

⁹²⁷ *Ibid.*

⁹²⁸ Judgment of 9 August 1994, *French Republic v Commission of the European Communities*, C-327/91, EU:C:1994:305, paragraph 15, 23; Opinion of Advocate General Tesauro in *French Republic v Commission of the European Communities*, C-327/91, EU:C:1993:941, paragraph 7.

⁹²⁹ A treaty is defined in this provision as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”

power internally to take individual decisions in the field of competition law, this does not alter the allocation of powers between the EU institutions with regard to the conclusion of international agreements. The Court therefore judged that the Commission did not have the competence to conclude the agreement with the US.⁹³⁰ A joint Decision of the Council and the Commission of 10 April 1995 approving the Agreement and declaring it applicable from the date it was first signed by the Commission remedied this situation.⁹³¹

In conclusion, the EU's bilateral competition cooperation agreements are full-fledged, binding international agreements. They are concluded between the government of the third country and the Council. They can therefore be considered as *state-to-state* agreements (although the EU is not a state), as opposed to *agency-to-agency* agreements.⁹³² While the competition authorities of both parties are involved in executing the obligations incorporated in the agreement, it are the governments of the parties that conclude it, and it is the EU (before the Lisbon Treaty: the EC) that commits itself internationally.⁹³³ It is thereby demonstrated again that treaty status is not dependent on the substance, 'hardness' of obligations or enforcement mechanism in an agreement.⁹³⁴

This qualification has consequences regarding the procedure of conclusion of such agreements. The legal basis for the EU's pre-Lisbon competition cooperation agreements were articles 87 EC Treaty, Article 235 EC Treaty,⁹³⁵ and to the extent that the Agreement applied to ECSC products, Articles 65 and 66 ECSC Treaty. After the entry into force of the Treaty of Amsterdam this became Article 83 and 308 EC Treaty,⁹³⁶ corresponding with current Articles 103 TFEU and 352 & 353 TFEU.⁹³⁷ Agreements were concluded under the procedure of the first subparagraph of Article 228 paragraph 3 EC Treaty, later Article 300 TEC, and currently Article 218 TFEU. As the agreements are entirely dedicated to competition law, which is an exclusive competence of the Commission, the member

⁹³⁰ Judgment of 9 August 1994, *French Republic v Commission of the European Communities*, C-327/91, EU:C:1994:305, paragraph 25, 36, 41, 43.

⁹³¹ Decision of the Council and of the Commission of 10 April 1995 concerning the conclusion of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, 95/145/EC, ECSC, OJ L 95, 27.4.1995. Report from the Commission to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, 10 April 1995 to 30 June 1996, COM(96) 479 final, 8 October 1996, 1.

⁹³² C. Damro, *Cooperating on Competition in Transatlantic Economic Relations: the Politics of Dispute Prevention*, New York, Palgrave MacMillan, 2006, 12. Switzerland, the UK, and the US, for instance, recognize agency-to-agency agreements as international agreements. Such executive agreements generally regulate detailed technical cooperation and do not include political obligations which would require ratification through parliaments. (A. Ott, E. Vos and F. Coman-Kund, "EU agencies and their international mandate: A new category of global actors?", CLEER Working Papers 2013/7, 11.)

⁹³³ Opinion of Advocate General Tesauro in *French Republic v Commission of the European Communities*, C-327/91, EU:C:1993:941, as cited in B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 77.

⁹³⁴ A. Aust, *Modern Treaty Law and Practice*, 3rd ed., New York, Cambridge University Press, 2013, 18.

⁹³⁵ Not for the 1998 Positive Comity Agreement, as cases falling under the Merger Regulation were not within the scope of that agreement.

⁹³⁶ Treaties Office Database, Summary of Treaty, Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities, available at <http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=360> (accessed December 2011).

⁹³⁷ Communication from the Commission to the Council concerning the Agreement between the European Communities and the Government of the United States on the application of positive comity principles in the enforcement of their competition laws, COM(97) 233 final, 97/0178(CNS), 18 June 1997, 4.

states are not involved,⁹³⁸ nor are other Directorate-Generals (DG's). The negotiation of this type of agreements is indeed done solely by DG Competition, leaving other important DG's such as DG Trade out of the process. Nevertheless, a Council mandate is needed to open negotiations.⁹³⁹ Approval of the agreement and authorization to sign the agreement is done by a Council decision, after a proposal of the Commission and consultation of the European Parliament.⁹⁴⁰ The Council must finally conclude the agreement with qualified majority.⁹⁴¹

In both *France v. Commission* cases, the Court rather artificially denied the existence of international administrative agreements within the EU legal system, thereby also rejecting the Commission's competence to conclude such agreements. Administrative agreements have a long history in the international cooperation practice. Even when they lack an explicit legal constitutional foundation, technical-administrative agreements outnumber formal constitutional treaties.⁹⁴² Even the Commentaries of the International Law Commission on both Vienna Conventions acknowledge the existence of a specific type of (binding) international agreement covering technical, administrative and financial issues, that are less formalised than 'formal treaties' and are concluded according to streamlined procedures.⁹⁴³ This judgment of the Court contributed to the fact that administrative agreements are surrounded by ambiguity and neglect.⁹⁴⁴ With this strict interpretation of the institutional balance in EU treaty-making, the Court did not engage in the discussion on administrative agreements.

2.3.2 Qualification on the soft law – hard law continuum

The concept of legalization, discussed earlier in Part I (see above, Part I, 2.4.3), revolves around the principles of obligation, precision, and delegation. While bilateral competition cooperation agreements are legally binding agreements, their content is de facto unenforceable.

As established, the 1991 EU-US Agreement and the 1998 Agreement on Positive Comity are full-fledged international agreements that are considered legally binding. In a communication from the

⁹³⁸ Art. 3(1)(b) TFEU.

⁹³⁹ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 62.

⁹⁴⁰ Council Decision of 16 February 2009 relating to the conclusion of the Agreement between the European Community and the Government of the Republic of Korea concerning cooperation on anti-competitive activities, 2009/586/EC, *OJ L* 202, 4.8.2009; Council Decision of 16 June 2003 concluding the Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities, 2003/520/EC, *OJ L* 183, 22.7.2003; Council and Commission Decision of 29 April 1999 concerning the conclusion of the Agreement between the European Communities and the Government of Canada regarding the application of their competition laws, 1999/445/EC, ECSC, *OJ L* 175, 10.7.1999; Decision of the Council and of the Commission of 29 May 1998 concerning the conclusion of the Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, 98/386/EC, ECSC, *OJ L* 173, 18.6.1998; Decision of the Council and of the Commission of 10 April 1995 concerning the conclusion of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, 95/145/EC, ECSC, *OJ L* 95, 27.4.1995.

⁹⁴¹ Article 218 TFEU io. Article 103 TFEU.

⁹⁴² F. Coman-Kund, *European Union Agencies as global actors – a legal study of the European Aviation Safety Agency, Frontex, and Europol*, Maastricht, Production print Datawyse/Universitaire Pers Maastricht, 2015, 145-147.

⁹⁴³ UN, Draft Articles on the Law of Treaties with commentaries 1966, Text adopted by the International Law Commission at its eighteenth session.

⁹⁴⁴ F. Coman-Kund, *European Union Agencies as global actors – a legal study of the European Aviation Safety Agency, Frontex, and Europol*, Maastricht, Production print Datawyse/Universitaire Pers Maastricht, 2015, 147

Commission to the Council with regard to the 1998 Positive Comity Agreement, however, the Commission repeatedly referred to the Agreement as ‘a political commitment’.⁹⁴⁵ In the abovementioned case *France v Commission* (C-327/91) as well, the Commission underlined the weakness of the commitments and obligations contained in the Agreement. The Agreement does not affect the discretion of the Commission and is to a large extent limited to formalising and systemising existing practices. The content and effect of first generation competition cooperation agreements are governed by the fact that such agreements do not require any changes to existing laws, and should be interpreted in a manner consistent with existing laws.⁹⁴⁶ Because of the large discretion given to the parties in first generation agreements, it is rightly said that the outcome of cooperation is determined more by policy than by law.⁹⁴⁷

According to STEPHAN, the content of bilateral competition cooperation agreements does not even create soft law, and merely expresses a desire to consult and cooperate, without limiting the discretion of the authorities or truly addressing problems of overlapping regulation. He goes even further to say that such agreements in fact illustrate the conflicting interests of jurisdictions and their difficulties with surrendering regulatory discretion.⁹⁴⁸ Within the realm of the OECD the agreements are identified as soft law as well, for the same reasons. Indeed, bilateral competition cooperation agreements do not amend domestic legislation and allow the parties to take into account own national interests when deciding whether or to what extent cooperation will take place.⁹⁴⁹ The US itself as well refers to its competition cooperation agreements with the EU as ‘soft’ antitrust cooperation agreements and indicates that this type of agreement serves as a catalyst for cooperation, but is not necessary for cooperation to take place.⁹⁵⁰

Theoretically, according to ABBOTT and SNIDAL, if the level of uncertainty (incomplete information making it difficult to anticipate all consequences of a legalized arrangement) and sovereignty costs are both low, a state will prefer a hard legal arrangement to manage its interactions, with high levels of obligation, precision, and delegation. In case sovereignty costs are high, but uncertainty is low, states will refrain from delegating, while allowing precise and/or binding arrangements. In the opposite case, low sovereignty costs and high uncertainty, states will opt for imprecise, but binding rules, subject to moderate delegation. Finally, if both factors are high, states will favour imprecise, flexible and hortatory rules that are not institutionalized.⁹⁵¹ This theoretical model explains the choices made in first generation competition agreements. States are confronted with high uncertainty, as the ‘stream of requests’ for assistance and the degree to which cooperation and coordination will be necessary is difficult to predict, and they are confronted with high sovereignty costs considering the

⁹⁴⁵ Communication from the Commission to the Council concerning the Agreement between the European Communities and the Government of the United States on the application of positive comity principles in the enforcement of their competition laws, COM(97) 233 final, 97/0178(CNS), 18 June 1997, 5.

⁹⁴⁶ Article IX 1991 EU-US Agreement, Article XI EU-Canada Agreement, Article 10 EU-Japan Agreement, and Article 10 EU-Korea Agreement.

⁹⁴⁷ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 78.

⁹⁴⁸ P. Stephan, “Global Governance, Antitrust, and the Limits of Cooperation”, *Cornell International Law Journal*, Vol. 38, 2005, 205.

⁹⁴⁹ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 35.

⁹⁵⁰ OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Contribution from the United States (DoJ), DAF/COMP/GF/WD(2012)46, 31 January 2012, 2.

⁹⁵¹ K. Abbott & D. Snidal, “Hard and Soft Law in International Governance”, *International Organization*, Vol. 54, No. 3, 2000, 444.

fact that competition policy is interlinked with for instance trade and industrial policy. The developers of the concept of legalization identify the Sherman Antitrust Act and the EU competition rules as examples of a reaction to uncertainty by states via the combination of somewhat imprecise rules and strong delegation.⁹⁵² In contexts of disagreement about norms and concerns about sovereignty and autonomy, hard law is difficult to accept.⁹⁵³ Moreover, in international competition law there are no minimum obligations to live by. This may be an additional factor for states to hold on to their sovereignty as they did not have to give it up previously.⁹⁵⁴

2.3.3 Appearance of first generation agreements in case-law

The Union's first generation agreements rarely make an appearance in the EU Courts' case-law.⁹⁵⁵ However, they are not entirely absent from it. Two examples demonstrate how the Courts or Advocate Generals have referred to the 1991 EU-US Agreement and provide insight in its functioning.

One example is the Opinion of Advocate General MENDOZZI in the *Archer Daniels appeal case*.⁹⁵⁶ The judgment of the former Court of First Instance at the origin of this appeal had confirmed the fines imposed by the Commission decision under scrutiny, including the increase of the fine for one of the companies, Archer Daniels Midland Co. (ADM), on account of aggravating circumstances, namely being the ring-leader of the cartel. ADM was moreover denied the benefits of the leniency programme.⁹⁵⁷ ADM appealed against this judgment to the Court of Justice. One particular plea on appeal of ADM is relevant in the context of this study, namely the argument that its procedural safeguards were not observed as a result of the use of an FBI Report as evidence of ADM's leadership status within the cartel.⁹⁵⁸

The Advocate General first recalled that there is no general prohibition on the use by the Commission of evidence produced in a proceeding other than that being conducted by the Commission itself. He departed from the premise that while in EU law there is freedom as to the form of evidence adduced and unfettered evaluation of evidence except in the case of specific

⁹⁵² K. Abbott, R. Keohane, A. Moravcsik, A.-M. Slaughter & D. Snidal, "The Concept of Legalization", *International Organization*, Vol. 54, No. 3, 2000, 405.

⁹⁵³ Arrangements such as the 1985 Vienna Convention for the Protection of the Ozone Layer (row V), imposing binding treaty obligations, but expressed in general, even hortatory language not connected to an institutional framework are often used in such cases. K. Abbott, R. Keohane, A. Moravcsik, A.-M. Slaughter & D. Snidal, "The Concept of Legalization", *International Organization*, Vol. 54, No. 3, 2000, 407.

⁹⁵⁴ D. Sokol, "Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements", University of Missouri-Columbia School of Law Legal Studies Research Paper No. 2007-13, 131.

⁹⁵⁵ Searches on both Curia, the website of the Court of Justice, and Eur-Lex, on the official title of the Agreements with Japan, Canada and South-Korea did not deliver any results with regard to appearance in EU case-law.

⁹⁵⁶ Opinion of Advocate General Mengozzi in *Archer Daniels Midland Co. v Commission of the European Communities*, C-511/06 P, EU:C:2008:604.

⁹⁵⁷ *Ibid.*, paragraph 6-7.

⁹⁵⁸ More specifically, it was apparent from the appendixes added to Part I Section C of the Statement of Objections, in which the Commission set out the facts on which its objections related and the evidence relied upon, that the Commission had relied upon a report of the statements made by a former ADM representative before representatives of the US DoJ and FBI agents during the antitrust proceedings carried out by the US authorities. This report contained the detailed description of the cartel arrangements and of the information on the meetings between the undertakings in question, as well as indications of the active leadership role played by ADM. Judgment of 9 July 2009, *Archer Daniels Midland Co. v Commission of the European Communities*, C-511/06 P, EU:C:2009:433, paragraph 17, 21.

provisions to the contrary, not all evidence is usable, and should be evaluated on the merits by the Commission or the Community (now EU) judicature.⁹⁵⁹

The central issue at stake was the use of a statement made in a proceeding other than the proceeding being conducted by the Commission itself, where the interested party was not given benefit of the procedural rights to which it was entitled in that context or those it would have enjoyed under Community law at the time if those statements had been taken directly by the Commission.⁹⁶⁰ The Advocate General adhered to a cumulative approach in this case, meaning that the procedural rights of the parties in the case should comprise both those of the State where the evidence originated and those of the State where the evidence was received. He moreover believed that the Commission should have informed the affected party of its intention to use statements originating from a foreign proceeding as evidence for the purposes of its final decision, regardless of whether or not there were doubts as to the compatibility of such use with the observance of procedural rights.⁹⁶¹

Advocate General MENGIOZZI questioned whether in casu the use as evidence of an FBI Report was compatible with ADM's procedural rights. He pointed to the responsibility of the Commission to take appropriate precautions in deciding how to use the document in the proceedings in a way that would not infringe any safeguards granted by US law regarding disclosure of the content of that document. One particular issue leading him to this conclusion concerned the protection of the confidential nature of the statements made by ADM's former representative to the US antitrust authorities. ADM put forward that the FBI Report was intended to be used only in proceedings in the US, indicating that the first page of the report stated that the disclosure of it to third parties was prohibited and that the US antitrust authorities had expressly agreed that the information provided would not be disclosed except for use in proceedings conducted by the US. The Advocate General acknowledged that the Commission may not have known of that commitment and that the Report was not forwarded to it by the US authorities but by another undertaking involved in the proceeding. He did not, however, believe that the Commission could not have been aware of the potential

⁹⁵⁹ Opinion of Advocate General Mengiozzi in *Archer Daniels Midland Co. v Commission of the European Communities*, C-511/06 P, EU:C:2008:604, paragraph 97-109, 114.

⁹⁶⁰ Which, according to Advocate General MENGIOZZI, may “be considered to include the limits placed by the foreign legal system, in the interests of the maker of the statements, on the transmission of the statements to other authorities and on their use by those authorities”. (Opinion of Advocate General Mengiozzi in *Archer Daniels Midland Co. v Commission of the European Communities*, C-511/06 P, EU:C:2008:604, paragraph 115-116.) In that sense the present case distinguishes itself from the earlier *Dalmine v Commission* cases (Judgment of 25 January 2007, *Dalmine SpA v Commission of the European Communities*, C-407/04 P, EU:C:2007:53; Judgment of 8 July 2004, *Dalmine SpA v Commission of the European Communities*, T-50/00, EU:T:2004:220), where the main reason for the impermissibility of the use of certain evidence would be the unlawful transmission or unlawful use of statements by the Commission under the legislation of the State of the authority that took the statements (and where that illegality was ascertained by the competent national court). In the *Dalmine v Commission* judgments the Commission received interview minutes directly from the national authorities which had recorded them, contrary to the present case, and the Court reasoned that the Commission could use those minutes as evidence as the transfer had happened legally considering there was no judgment declaring otherwise. The *Dalmine* cases moreover concerned Member States only, contrary to the *ADM* case. (Opinion of Advocate General Mengiozzi in *Archer Daniels Midland Co. v Commission of the European Communities*, C-511/06 P, EU:C:2008:604, paragraph 116, 118, 143.) It should be pointed out that the Court of First Instance at the time, as well as Advocate General GEELHOED referred to the legality of the use of the information as evidence on the basis of national law, whereas the Court of Justice in *Dalmine v Commission* only referred to the lawfulness of the transmission of the information. Advocate General MENGIOZZI claimed in this regard that in the judgment the term ‘transmission’ of the document could be interpreted as referring to transmission thereof with a view to its use. (Opinion of Advocate General Mengiozzi in *Archer Daniels Midland Co. v Commission of the European Communities*, C-511/06 P, EU:C:2008:604, footnote 85.)

⁹⁶¹ Opinion of Advocate General Mengiozzi in *Archer Daniels Midland Co. v Commission of the European Communities*, C-511/06 P, EU:C:2008:604, paragraph 119, 124.

conflict created by the use of the FBI Report with safeguards under US law regarding the confidential treatment of the information supplied by ADM's former representative, in particular because of the 'state of the relations' between the EU and US in the sphere of cooperation between their respective competition authorities.⁹⁶²

This is where the 1991 EU-US Agreement and the 1998 Positive Comity Agreement come into play. The Advocate General underlined that the Agreements do not allow for the exchange of information to the extent that it is not already allowed under the laws of the authority possessing the information and oblige the parties to respect their confidentiality rules. Exchange of confidential information can only take place with the consent of the party providing the information. Confidentiality rules are moreover particularly important in the context of participation to a leniency program, as was the case for ADM. Absent any coordination of leniency programmes information exchange between enforcers would allegedly create a powerful disincentive for undertakings to engage in such programmes (see below, Part II, 3.5.2.6). According to the Advocate General the Commission was therefore obliged to check the legality of the use of the document with the US antitrust authorities, in particular in order to obtain on that matter at least an initial pronouncement.⁹⁶³ Despite the attention that Advocate General MENGIOZZI devoted to this subject, the Court did not offer a clear answer, instead stating that discussion of this matter was no longer necessary in view of the assessment of ADM's first plea concerning its rights of defence in relation to its classification as a leader. In sum, ADM's claim that the Commission gave no warning in the statement of objections of the facts that would be taken into account in the decision to find that ADM held a role as leader, and that the mere occurrence of the documents from which those facts emanate in an annex was not sufficient to guarantee the appellant's rights of defence, was upheld. As the second to fifth pleas of the appeal also concerned the classification of ADM as a leader of the cartel on the basis of evidence taken from the FBI Report, their scrutiny was unnecessary according to the Court.⁹⁶⁴

In *Dow Chemical*, the Court again offered some clarification regarding the scope of the 1991 EU-US Agreement. In this case the applicant claimed that the negative comity provision in the EU-US Agreement implied that US law should have been taken into account as the Commission fined a company established in the US for the conduct of another company that was also established in the US. US law differs from EU law with regard to parental liability of companies, and under US law the applicant would not have been held liable for the illegal conduct at stake. The applicant furthermore argued that the Commission did not illustrate how the applicant's conduct would have had an effect in the EU, and that the Commission must refrain from applying stricter corporate governance standards that are inconsistent with those applied in US corporate law.⁹⁶⁵

The Court reminded the applicant that there is no principle or public international law convention obliging the Commission, when imputing unlawful conduct under EU competition law, to take account of assessments made by the competition authorities of a non-member State, and that because of the specific nature of the legal interests protected in the EU, the Commission's assessments may diverge considerably from those of the competent authorities of non-member

⁹⁶² Ibid., paragraph 129, 130, 132-134, 140.

⁹⁶³ Ibid., paragraph 136, 138, 143.

⁹⁶⁴ Judgment of 9 July 2009, *Archer Daniels Midland Co. v Commission of the European Communities*, C-511/06 P, EU:C:2009:433, paragraph 64, 97.

⁹⁶⁵ Judgment of 2 February 2012, *The Dow Chemical Company v European Commission*, T-77/08, EU:T:2012:47, paragraph 68.

States.⁹⁶⁶ It added that the 1991 EU-US Agreement was intended to promote cooperation and coordination and to minimise the possibility or impact of differences between the parties in the application of their competition laws, but did not aim to govern the imputation of a subsidiary's unlawful conduct to its parent company.⁹⁶⁷ The Court went even further by explaining that even in the situation where such an agreement could be invoked, the negative comity provision clarified that the Agreement does not contain an obligation to arrive at a specific result, but is limited to setting out the line of conduct that the parties request one another to follow when enforcing their respective competition laws, confirming the soft nature of the obligations in the Agreement.⁹⁶⁸

2.4 Use of the EU-US agreements

While the appearance of the agreements in the EU's case-law is very limited, there are other ways to measure their impact. From 1995 to 2000, the Commission issued fairly detailed reports on the transatlantic activity that occurred under the agreements. In the first report, covering the period April 1995 to June 1996, the Commission elaborated upon the types of cooperation that was possible, and what kind of topics could be discussed, ranging from the timing of an investigation, to product market discussions, to the discussion of suitable remedies.⁹⁶⁹ The succeeding reports provided concrete data regarding the amount of notifications that took place between both parties, showing an overall balance between EU-US and US-EU interactions, wherein merger cases formed a clear majority. Examples were provided of cases in which cooperation took place, to the extent that these could be publicly discussed.⁹⁷⁰ After 2000 the reports stopped, likely because cooperation had become more common and reporting in detail was no longer a priority or had become too resource-

⁹⁶⁶ Technically the Court's statement here is not correct. The internationally recognised principle of comity actually does contain the obligation to take account of the assessments made by other jurisdictions, but there is no obligation to adjust behaviour accordingly.

⁹⁶⁷ Judgment of 2 February 2012, *The Dow Chemical Company v European Commission*, T-77/08, EU:T:2012:47, paragraph 102. Also see Judgment of 29 June 2006, *Showa Denko KK v Commission of the European Communities*, C-289/04 P, EU:C:2006:431, paragraph 55, 58, 59. Similarly, in the *SGL Carbon* case, the Court stated that "the agreements between the European Communities and the Government of the United States of America of 23 September 1991 and 4 June 1998 on the application of positive comity principles in the enforcement of their competition laws [...] are confined to practical procedural questions like the exchange of information and cooperation between competition authorities and are not in the least related to the offsetting or taking into account of penalties imposed by one of the parties to those agreements." Judgment of 29 June 2006, *SGL Carbon AG v Commission of the European Communities*, C-308/04 P, EU:C:2006:433, paragraph 35; Also see Judgment of 15 June 2005, *Tokai Carbon Co. Ltd, Intech EDM BV, Intech EDM AG and SGL Carbon AG v Commission of the European Communities*, Joined cases T-71/03, T-74/03, T-87/03 and T-91/03, EU:T:2005:220, paragraph 116.

⁹⁶⁸ Judgment of 2 February 2012, *The Dow Chemical Company v European Commission*, T-77/08, EU:T:2012:47, paragraph 102.

⁹⁶⁹ Report from the Commission to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, 10 April 1995 to 30 June 1996, COM(96) 479 final, 8 October 1996.

⁹⁷⁰ Report from the Commission to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, 1 July 1996 to 31 December 1996, COM(97) 346 final, 4 July 1997; Commission report to the Council and the European Parliament on the application of the agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, 1 January 1997 to 31 December 1997, COM/98/0510 final, 3 September 1998; Report from the Commission to the Council and the European Parliament on the application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, 1 January 1998 to 31 December 1998, COM/99/0439 final, 13 September 1999; Commission Report to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, 1 January 1999 to 31 December 1999, COM(2000) 618 final, 4 October 2000.

intensive, or because of a lack of similar reports and transparency across the Atlantic. What followed were fairly standardized paragraphs on international cooperation with limited examples and without concrete numbers, to be found in the Annual Reports on Competition Policy and the accompanying Commission Staff Working Documents. Detailed, official EU statistics on international cooperation in competition cases do not exist.

The 2007 ICN Report on cooperation between competition agencies in cartel investigations confirmed the difficulty of gathering data on cooperation. Competition agencies could not provide relevant data because the provisions under which cooperation took place entered into force too recently, or because they were not applied independently of other cooperation provisions and data were categorised under other laws. The report stated that there was no evaluation of this particular cooperation instrument, and that no difficulties with regard to its application were reported.⁹⁷¹

Nevertheless, many examples can be provided of cases in which cooperation took place. The general tone in the discourse of EU officials is that international cooperation has become part of the daily enforcement culture. However, while examples of cases in which international cooperation took place are relatively easy to come by, it is more difficult to find detailed information on what exactly such cooperation entailed in each of those cases.

In the 2012 OECD/ICN Joint Survey, respondents confirmed that international cooperation is most frequent in the area of merger cooperation.⁹⁷² This is also the environment in which the most detailed accounts of cooperation are available. It should be mentioned, however, that no direct causal link can be established between the cooperation in the examples mentioned below, and first generation agreements. The examples do provide an image of what forms of cooperation are possible. A first example is the *GE/Alstom* case, a recent Phase II case cleared subject to remedies. Cooperation took place between the Commission and its peers in Brazil, Canada, China, Israel, South Africa, Switzerland and the United States. Different conditions in the respective markets for heavy duty gas turbines resulted in different concerns for the DoJ and the Commission. Nevertheless, cooperation took place both regarding the investigation and the analysis of remedies. As a result, the deal was approved on the same day, with aligned remedies addressing the concerns expressed on both sides of the Atlantic.⁹⁷³

Another recent merger case in which cooperation took place was the *GlaxoSmithKline/Novartis* healthcare case, in which the Commission cooperated with the competition agencies of Canada, China, Australia, Brazil, Pakistan, and the US. Despite a different substantive analysis, the case was resolved with compatible and non-conflicting remedies imposed by the EU and the US, which was relied upon by the authorities of Canada, Australia and Pakistan.⁹⁷⁴ The *Google/DoubleClick* merger was

⁹⁷¹ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 15.

⁹⁷² OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 58.

⁹⁷³ X., “Global merger enforcement workshop at the International Competition Network (ICN)”, *EU Competition and Regulatory Newsletter Slaughter and May*, 25 September – 1 October 2015, Issue 38. Also see Commission Decision declaring a concentration to be compatible with the internal market and the EEA agreement, Case M.7278 – General Electric/Alstom (Thermal Power – Renewable Power & Grid Business, C(2015) 6179 final, 8 September 2015.

⁹⁷⁴ X., “Global merger enforcement workshop at the International Competition Network (ICN)”, *EU Competition and Regulatory Newsletter Slaughter and May*, 25 September – 1 October 2015, Issue 38. Also see Commission Decision pursuant to Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation No 139/2004, Case No COMP/M.7276 – Glaxosmithkline/Novartis Vaccines Business (Excl. Influenza/Novartis Consumer Health Business), 28 January 2015.

subject to merger control in both the US and the EU. After a largely similar assessment both competition authorities concluded that there were no competition concerns. Differences in assessment mainly related to market definition. Both agencies extensively analysed possible non-horizontal effects of the transaction, albeit with a slightly different focus, reaching the same conclusion, in particular regarding the extent to which DoubleClick possessed market power and the presence of network externalities.⁹⁷⁵ Close cooperation between the DoJ and the European Commission during the global *Google/Motorola Mobility* investigation resulted in both the DoJ and the European Commission announcing their decisions on the same day, and with the same conclusion to clear the transaction, based largely on the same substantive analysis.⁹⁷⁶ Also the *WorldCom/MCI* merger is a well-known example of cooperation between the US DoJ and the European Commission. Confidentiality waivers allowed the coordination of requests for information, joint meetings with the parties, and settlements that met the concerns on both sides.⁹⁷⁷ Such cooperation also occurred during the *Cisco/Tandberg* merger. Waivers and (third) party cooperation facilitated close cooperation between the Antitrust Division and the European Commission throughout the investigation. Numerous contacts between the investigative staffs were held, documents were exchanged, competitive effects analyses were shared, joint meetings and interviews were conducted. Senior agency management was also in touch. The Antitrust Division took into account the commitments given to the European Commission in determining that the proposed merger was not likely to be anticompetitive. The announcements of the DoJ and the European Commission were made on the same day.⁹⁷⁸ Other examples of merger cases in which international cooperation involving the EU took place are *Guinness/Grand Metropolitan*, *Dresser/Halliburton*, *Exxon/Mobil*, *Alcoa/Reynolds*,⁹⁷⁹ *Agilent/Varian*,⁹⁸⁰ *Procter & Gamble/Gillette*, *Schering-Plough/Merck*, *Ticketmaster/Livenation*,⁹⁸¹ *BHP Billiton/Rio Tinto*,⁹⁸² *Intel/McAfee*,⁹⁸³ *Pfizer/Wyeth*, *Panasonic/Sanyo*,⁹⁸⁴ *Thomson/Reuters*⁹⁸⁵ and *Novartis/Alcon*.⁹⁸⁶

⁹⁷⁵ J. Brockhoff, B. Jehanno, V. Pozzato, C.-C. Buhr, P. Eberl, & P. Papandropoulos, "Google/DoubleClick: The first test for the Commission's non-horizontal merger guidelines", *Competition Policy Newsletter*, No. 2, 2008, 60.

⁹⁷⁶ X. "Antitrust Merger Enforcement Update and Outlook", *Gibson Dunn*, 21 March 2013, available at <http://www.gibsondunn.com/publications/pages/2013-Antitrust-Merger-Enforcement-Update-Outlook.aspx> (accessed November 2015).

⁹⁷⁷ E. Fox, "Antitrust without borders: from roots to codes to networks", E15 Expert Group on Competition Policy and the Trade System Think Piece, November 2015, 1.

⁹⁷⁸ R. Brandenburger, "International competition policy and practice: new perspectives?", remarks as prepared for The Centre of European Law, King's College, London, 29 October 2010, 9-10.

⁹⁷⁹ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 80.

⁹⁸⁰ Contribution by the United States, Roundtable on Modalities and Procedures for International Cooperation in Competition Cases Involving more than one Country, Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 8-10 July 2013.

⁹⁸¹ S. Scott, "A Canadian Perspective on the Role of Comity in Competition Law Enforcement in a Globalised World", *Competition Law International*, April 2011, 73.

⁹⁸² J. Almunia, "Taking Stock and Looking Forward: a Year at the Helm of EU Competition", *Revue Concurrences Conference: New Frontiers of Antitrust 2011*, Paris, 11 February 2011.

⁹⁸³ "[...] it shows our good relations with sister agencies outside the EU. In this case, cooperation with the US Federal Trade Commission has been excellent and has led to a swift clearance in both jurisdictions." J. Almunia, "Taking Stock and Looking Forward: a Year at the Helm of EU Competition", *Revue Concurrences Conference: New Frontiers of Antitrust 2011*, Paris, 11 February 2011.

⁹⁸⁴ Commission staff working document accompanying the Report from the Commission on Competition Policy 2009, COM(2010)282 final, SEC/2010/0666 final, 3 June 2010, 122, paragraph 523.

⁹⁸⁵ Commission staff working document SEC/2009/1004 final accompanying the Report from the Commission on Competition Policy 2008, COM(2009)374 final, 23 July 2009, 99, paragraph 392.

The *Thermo Fisher Scientific/Life Technologies* first phase conditional clearance case can serve as a textbook example of international cooperation between competition authorities, both formally and informally, and with a significant number of competition authorities worldwide, given that several jurisdictions were reviewing the transaction. More specifically, cooperation took place between the European Commission, US FTC, CCB, ACCC (Australian Competition and Consumer Commission), NZ CC (New Zealand Commerce Commission), JFTC, KFTC (Fair Trade Commission Republic of Korea), and Mofcom (Ministry of Commerce People's Republic of China).⁹⁸⁷ Both US companies were active in the life sciences market, namely laboratory instruments and consumables. The EC made the acquisition of Life Technologies Corp. by Thermo Fisher Scientific Inc. dependent on divestments of business producing and supplying media and sera for cell culture, gene silencing products and polymer-based magnetic beads. The EU and US held different opinions with regard to the last sector, where the FTC was in a position to dismiss concerns but the EC was not. As parties were under time pressure, they decided to avoid going into phase II by submitting remedies to the EC regarding this market. Conflicting remedies were averted due to several forms of cooperation. The EC was able to take a lead role in the cooperation efforts as it was regarded as a neutral authority by other reviewing authorities because the merger would take place between two US companies. Exchange of views took place with the FTC and the ACCC. The FTC was approached first, and despite procedural differences, dialogue started very early on in the case, namely while the case was still in pre-notification before the EC. This allowed the EC case team to become familiar with market characteristics and dynamics from the start. A call from the EC case team to the parties to pay particular attention to timing alignment was answered positively. This allowed overlap of key decision-making times in the case, cultivating meaningful discussion (at least between US FTC, EC and ACCC). This, in turn, resulted in the avoidance of a possible misalignment of the remedy discussion and implementation stages of the case, such as conflict of interest issues regarding potential trustees or buyer approval. Regular conference calls were held as well as tripartite e-mail exchanges among the case teams. Waivers provided by the parties early on in the case proved to be particularly useful and allowed the relevant authorities to share key internal documents such as the Form CO and draft remedy proposals. The most detailed discussions concerned remedy design (such as the scope of the divestment business/assets), implementation issues, and timing issues (approval of buyers, appointment of trustee). This resulted in the EC buyer approval decision coinciding with the FTC clearance decision and the approval of the same trustee by the EU and US authorities. Cooperation with the ACCC as well resulted in workable non-conflicting outcomes. The CCB cleared the transaction based on the remedies submitted to the European Commission. This cooperation also benefitted the parties, as they were relieved from reporting on monitoring of the implementation of remedies in that jurisdiction. Cooperation with the NZ CC, KFTC and JFTC was less intense, but the EC case team explained its findings at different stages of the procedure and all relevant authorities were kept informed of the on-going processes.

Another example is the first phase conditional clearance case involving the acquisition by Crane Co. (US) of MEI Conlux Holdings (US), Inc. and MEI Conlux Holdings (Japan), Inc. in the unattended

⁹⁸⁶ Annex to the Commission staff working paper accompanying the Commission Report on Competition Policy 2010, SEC/2011/0609 final, February 2011, paragraph 420.

⁹⁸⁷ Commission Decision declaring a concentration to be compatible with the common market according to Council Regulation (EC) No 139/2004, Case No COMP/M.6944 – Thermo Fisher Scientific/ Life Technologies, 26 November 2013.

payment systems sector.⁹⁸⁸ While the EC clearance was conditional upon the divestment of certain banknote and coin handling product lines in Germany (with related sales limited to EEA customers) and Canada, working on the basis of (at least) EEA-wide markets,⁹⁸⁹ the US FTC cleared the case unconditionally based on worldwide market definitions. In this particular case outcomes were different despite close and open dialogue between the EC and FTC, due to the specificities of each respective market. Timing was not aligned. Only by the time the US had already proceeded to the stage of issuing a second request, did the EC receive a pre-notification referral request from the parties. Nevertheless, the EC decision was adopted two to three weeks before the FTC issued its own. Cooperation involved frequent (generally weekly) contacts and the authorities kept each other fully informed on the progress of their cases and analysis (in particular regarding product market as this industry had not yet been the subject of merger review procedures by the EC) throughout the respective review procedures. Again, confidential information, such as the form CO or documents identified during document review and collected from the parties, could be exchanged between the two authorities due to waivers given by the parties.

Two other examples take place in the aviation equipment market. The first one is the second phase conditional clearance of the acquisition of Goodrich Corporation by United Technologies Corporation, two US-based companies.⁹⁹⁰ The EC imposed conditions relating to the divestment of Goodrich's businesses in electrical power generation and in engine controls for small engines, and to Rolls Royce being granted an option to acquire Goodrich's lean burn fuel nozzle R&D project. Cooperation took place mainly with the US DoJ and to a lesser extent with the CCB, and resulted in the creation of synergies in investigations through joint investigative efforts. For instance, the EC and DoJ conducted common interviews of market participants and exchanged the findings of their respective investigations, thereby saving time and facilitating inter-agency discussion. Detailed discussions were also held on remedy design such as the duration of divestiture periods and transitional services. This resulted in non-identical but non-conflicting remedies. Aware of the fact that the purchaser criteria were different in the two jurisdictions, the authorities coordinated their approaches in relation to implementing steps for remedies, leading to a common monitoring trustee being used in both jurisdictions and the approval of the same purchasers for the divestment businesses. In the end all three authorities issued their decisions on the same day. The DoJ and the Commission accepted remedies that also fully addressed the CCB's competition concerns in Canada.

The *General Electric* (US) and *Avio S.p.A* (Italy) merger took place in the same industry branch as the *UCT/Goodrich* merger case.⁹⁹¹ This case was conditionally cleared in the first phase by the EC, with commitments related to *military* aircrafts for export markets outside the EEA, an issue that did not occur in the US market. The FTC's conditions related to a formal remedy for the *civil* aerospace markets, in the form of a consent order repeating the contractual supply obligations entered into by

⁹⁸⁸ Commission Decision declaring a concentration to be compatible with the common market according to Council Regulation (EC) No 139/2004, Case No COMP/M.6857 – Crane Co/ Mei Group, 19 July 2013.

⁹⁸⁹ The EC found that the characteristics and competitive dynamics of certain market segments in the EEA could be distinguished from those in other regions of the world and customers considered the merging parties as closer competitors in the EEA in certain segments.

⁹⁹⁰ Commission Decision declaring a concentration to be compatible with the internal market and the EEA agreement according to Council Regulation (EC) No 139/2004, Case No COMP/M.6410 - UTC/ Goodrich, 26 July 2012. Also see P. Brink, "International Cooperation at the Antitrust Division: A View from the Trenches", remarks as prepared for the Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law, Chicago Illinois, 19 April 2013, 10-12, <http://www.justice.gov/atr/file/518366/download> (accessed November 2015).

⁹⁹¹ Commission Decision declaring a concentration to be compatible with the common market according to Council Regulation (EC) No 139/2004, Case No COMP/M.6844 - GE /AVIO, 1 July 2013.

GE and concerned market participants during the review procedure. Again procedural differences did not stand in the way of early cooperation, even during the pre-notification phase before the EC. The length of this phase was moreover shortened by virtue of joint investigative calls and inter-agency interaction that led to a swift understanding of the problems at hand. The case also demonstrated that timing can be aligned despite procedural differences if both the parties and the relevant authorities cooperate. According to the Commission both authorities maximised the available internal flexibility in their procedures to align internal deadlines and therefore decision making stages to the best extent possible. Apart from weekly conference calls between the case teams, joint calls were held with the parties, surrounded by pre- and post-calls during which the authorities could prepare and assess the talks. Joint customer calls (with consent of the customers) were also held early on in the case. Third parties could benefit from this in the form of a more targeted set of requests for information (RFIs) being sent to market participants by the EC case team and less follow up calls with customers. Draft RFIs prepared by the EC were shared and discussed with the US FTC. Waivers from the parties were obtained early on in the process allowing the EC case team to share the Form CO and replies to the RFIs with the FTC. Again, cooperation resulted in the creation of synergies, in particular via close cooperation between the teams of economists from the two authorities who drafted joint economic data RFIs and kept in regular contact to discuss their respective assessment and ways forward. Such dialogue also allowed for corroboration/double checking of information submitted by third parties and parties during the respective procedures. Finally, cooperation led to broader processes of learning, for instance regarding interview techniques.

These examples demonstrate that cooperation is varied and adapted to the needs of the case. While cooperation is generally most intense during the remedies phase, early cooperation and communication throughout the whole procedure are crucial for the efficient investigation of the case. Creating awareness of parallel investigations, discussion of the timing of such investigations, discussions on the product market and finally coordination of remedies all constitute elements of inter-agency cooperation in merger cases.⁹⁹² Waivers, finally, prove to be essential.

While concrete examples of international cooperation are more difficult to come by in the cartel sector, the Commission stated that in cartel investigations as well cooperation takes place regularly and from the very early stages of the case. Important aspects are the timing and scope of initial investigative actions. Often cooperation serves to prepare or coordinate inquiries or inspections, such as simultaneous dawn raids to preserve the element of surprise, but it may also include more general discussions on the timing of inspections and discussions on the scope of the actions. Cooperation can continue throughout further stages, during which discussions on several aspects of the case can take place.⁹⁹³ International cooperation in cartel cases occurs most frequently between agencies faced with the same leniency applicant. In its contribution to a roundtable on the modalities and procedures for international cooperation in competition cases, organised by the Intergovernmental Group of Experts on Competition Law and Policy of the UN, the US clarified that upon receipt of a leniency application, the applicant is asked whether other jurisdictions have been approached and a whether the applicant wishes to grant a confidentiality waiver. If the latter is the case, the DoJ is able to discuss with the relevant other jurisdiction(s) issues such as the scope and effects of the conduct, available evidence, future plans for investigating the matter, or investigative

⁹⁹² H. Dieckmann, "The Benefits of Cooperation between Competition Authorities", Inaugural Symposium of the Competition Policy Research Center, Tokyo, 2003, 1, at <http://www.jftc.go.jp/cprc/DP/CPDP-9-E.pdf> (accessed December 2011).

⁹⁹³ OECD, Global Forum on Competition, Improving international co-operation in cartel investigations, Contribution from the European Union, DAF/COMP/GF/WD(2012)53, 9 February 2012, 4.

strategies. Other forms of cooperation are the coordination of searches, service of subpoenas, drop-in interviews, and the timing of charges, to avoid premature disclosure of an investigation or possible destruction of evidence. In the absence of a waiver, general coordination with other jurisdiction may still take place, but will be obstructed as the information provided by the leniency applicant or its identity may not be disclosed.⁹⁹⁴

In the cartel sector the *Auto Parts* investigation, *Air Cargo* cases, *Liquid Crystal Display* investigation,⁹⁹⁵ *Marine Hose* cartel,⁹⁹⁶ *Vitamin* cartel, *Lysine and Citric Acid* cartel, *Refrigerator Compressor* cartel, and the *Graphite Electrode* cartel⁹⁹⁷ can be mentioned as examples of cases in which international cooperation took place. In the *Heat Stabilisers, Impact Modifiers and Processing Aids* cartel investigations, the American, Japanese and Canadian antitrust authorities carried out simultaneous inspections to ascertain whether there was evidence of a cartel agreement and related illegal practices concerning price fixing and market sharing. The heat stabilisers cartel marked the first occasion that the European Commission, the US DoJ, the Japan Fair Trade Commission (JFTC) and the Canadian Competition Bureau (CCB) coordinated surprise inspections into suspected cartels operating worldwide.⁹⁹⁸ The *E-books* investigation was referred to by the US Acting Assistant Attorney General at the time of filing, POZEN, as a shining example of continued cooperation efforts. The investigation concerned an alleged conspiracy to increase prices for e-books by Apple and five of the largest book publishers in the US.⁹⁹⁹ No details can be found, however, on what exactly this exemplary cooperation consisted of, only that there was close interaction between the DoJ and the EC, with frequent contact between investigative staff and senior officials. The Commission in its press release merely stated that it worked closely with the US DoJ in order to seek a global solution to the identified horizontal concerns.¹⁰⁰⁰ The US government underlined that it was the first case in which the DoJ had engaged in such close cooperation with a non-US agency in a conduct investigation.¹⁰⁰¹

⁹⁹⁴ Contribution by the United States, Roundtable on Modalities and Procedures for International Cooperation in Competition Cases Involving more than one Country, Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 8-10 July 2013.

⁹⁹⁵ J. Wayland, "International cooperation at the antitrust division", remarks as prepared for the International Bar Association's 16th Annual Competition Conference, Florence, 14 September 2012.

⁹⁹⁶ Contribution by the United States, Roundtable on Modalities and Procedures for International Cooperation in Competition Cases Involving more than one Country, Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 8-10 July 2013.

⁹⁹⁷ H. First, "The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law", *Antitrust Law Journal*, Vol. 68, No. 3, 2001.

⁹⁹⁸ European Commission, "Statement on inspections at producers of heat stabilisers as well as impact modifiers and processing aids - International cooperation on inspections", MEMO/03/33, Brussels, 13 February 2003.

⁹⁹⁹ P. Brink, "International Cooperation at the Antitrust Division: A View from the Trenches", remarks as prepared for the Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law, Chicago Illinois, 19 April 2013.

¹⁰⁰⁰ European Commission, Press Release, "Commission accepts legally binding commitments from Simon & Schuster, Harper Collins, Hachette, Holtzbrinck and Apple for sale of e-books", IP/12/1367, Brussels, 13 December 2012; also see S. Pozen, remarks as prepared for delivery at the E-books Press Conference, 11 April 2012, www.justice.gov/atr/public/speeches/282147.htm (accessed November 2015): "never before have we seen this kind of cooperation in a civil antitrust enforcement matter."

¹⁰⁰¹ OECD, Discussion on International Co-operation, Contribution of the United States, DAF/COMP/WP3/WD(2012)24, 12 June 2012, 7. Also see DoJ Press Release, "Justice Department Reaches Settlement with Three of the Largest Book Publishers and Continues to Litigate Against Apple Inc. and Two Other Publishers to Restore Price Competition and Reduce E-book Prices", 12-457, 11 April 2012, and E. Kurgonaite, "Apple and four publishers in settlement talks with European Commission", *Financial Times*, 13 April 2012.

Conduct investigations present the least opportunity for cooperation, in part because unilateral conduct cases as such occur less frequently and are often domestic in nature. This does not mean that cooperation does not occur at all. In 2010 staff of the FTC and DG COMP exchanged views on theories of harm and methods of economic analysis during their investigations of charges against Intel Corp. regarding the alleged illegal stifling of competition in the market for computer chips.¹⁰⁰²

2.5 Assessment

The assessment of the EU's first generation agreements will take place on two levels, namely the instrument itself – a binding international treaty – and the content – the (elaboration of the) cooperation mechanisms offered. This will be done by linking back to respectively the benefits offered by soft(er) law and the benchmarks developed in the first section of Part II (see above, Part I, 2.4.4, and Part II, 1.3 respectively). An explicit distinction is not made, however, as it are the agreements as a whole that are assessed. Before embarking on the assessment based on the benchmarks developed in this study, some general data are provided regarding the impact of first generation agreements.

2.5.1 General impact

2.5.1.1 An instrument that is available and relevant

It is difficult to identify the successes of first generation agreements as empirical information is largely missing.¹⁰⁰³ Nevertheless, there are some indications of their impact. Competition authorities generally possess a variety of legal bases to engage in international competition cooperation, whether specifically designed for competition law enforcement or not. The joint survey by the ICN and the OECD in 2012 showed that bilateral competition agreements are among the instruments most widely available to competition agencies to engage in international cooperation, as illustrated by the table below.¹⁰⁰⁴

¹⁰⁰² Contribution by the United States, Roundtable on Modalities and Procedures for International Cooperation in Competition Cases Involving more than one Country, Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 8-10 July 2013.

¹⁰⁰³ As mentioned, Commission reports stopped providing information early on.

¹⁰⁰⁴ Be aware that 'bilateral competition agreements' in these tables include both agreements and MoUs. Not all legal bases are explained, however, in the report. It is unclear, for instance, what is meant with 'multilateral competition agreements', and whether this only refers to non-binding instruments such as OECD or ICN recommendations. Nor is it explained what would be the difference between free trade agreements and other 'bilateral non-competition agreements'. OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 38.

Table 8: Availability of legal bases for international co-operation

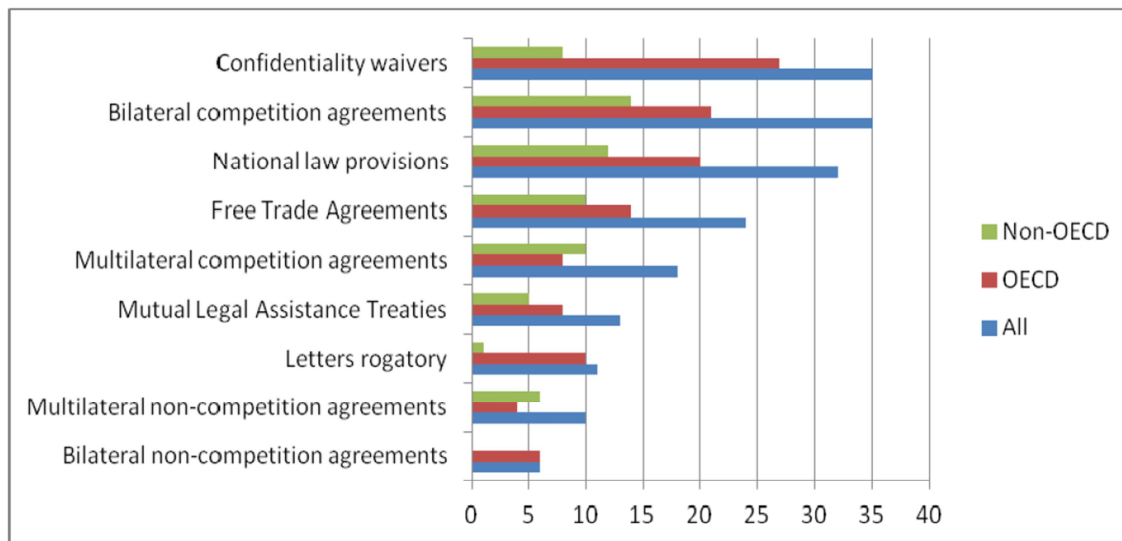
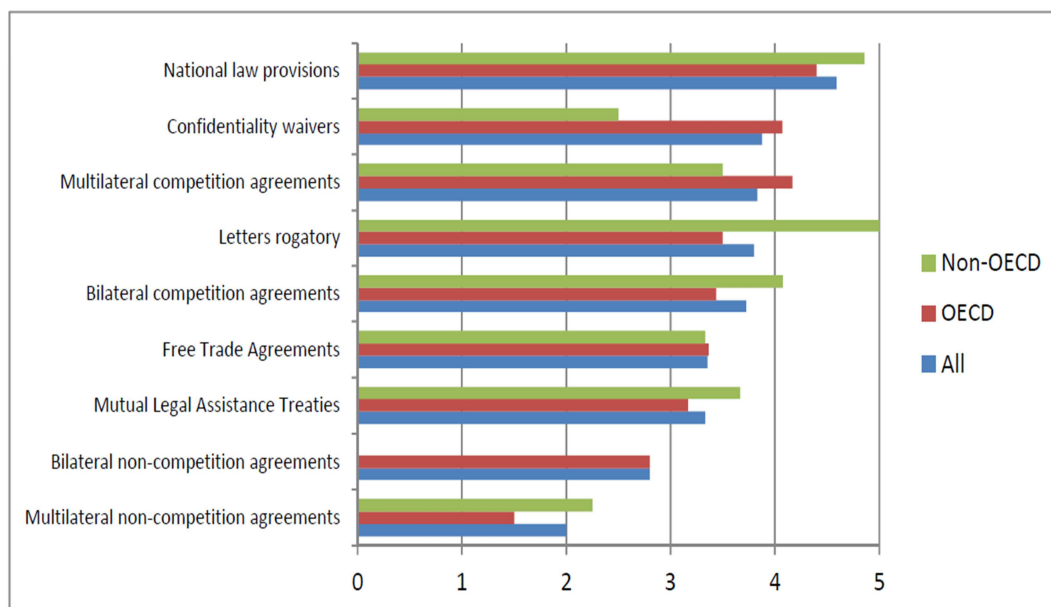


Figure 3. OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 38. (numbers = numbers of respondents)

A study by the ICN has pointed out that even where national law provisions directly authorise cooperation, an agreement is nevertheless concluded. It is therefore at least perceived to offer added utility.¹⁰⁰⁵

Table 9: Average score for ‘Relevance’ of legal bases for co-operation⁴¹



¹⁰⁰⁵ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 13.

Figure 4. OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 39.

The table above shows that instruments such as national law provisions, confidentiality waivers and multilateral competition agreements specifically aimed at competition cooperation, are perceived by the responding agencies as most relevant for cooperation, as opposed to non-competition-specific agreements. While bilateral competition agreements are widely available, and therefore offer parties at least the possibility to engage in international cooperation, its relevance is scored somewhat less by the respondents, although the overall score is still good, in particular among non-OECD members.¹⁰⁰⁶

2.5.1.2 An important factor in deciding whether or not to cooperate

As the tables below indicate, having a legal basis for international cooperation constitutes the main factor that competition agencies consider when either requesting or offering cooperation. It is unfortunate that the OECD tables do not distinguish between the different legal bases available, as this would have provided more meaningful insight into the relative value of each option, for instance whether a bilateral agreement plays a bigger role than an OECD recommendation. Indeed, while it is clear, and rather straightforward, that the existence of a legal basis for cooperation will play a big role in deciding whether or not to cooperate, it is not obvious whether an agreement would provide a bigger incentive to do so compared to for instance a multilateral recommendation.

¹⁰⁰⁶ The numbers represent a score on a scale ranging from 1 to 5, 1 being 'not relevant' and 5 being 'very relevant'. Agencies were asked to assign a score to each instrument. An average score was calculated by dividing the sum of scores provided by respondents by the number of respondents who provided a score for each instrument. Respondents did not mark a score for categories of legal instruments which they did not indicate as available to them. It might be surprising that letters rogatory appear as very highly ranked by non-OECD respondents, but this merely reflects the fact that only one non-OECD agency provided a score for 'relevance' of letters rogatory, scoring relevance as 5.

Table 21: Factors considered in providing co-operation

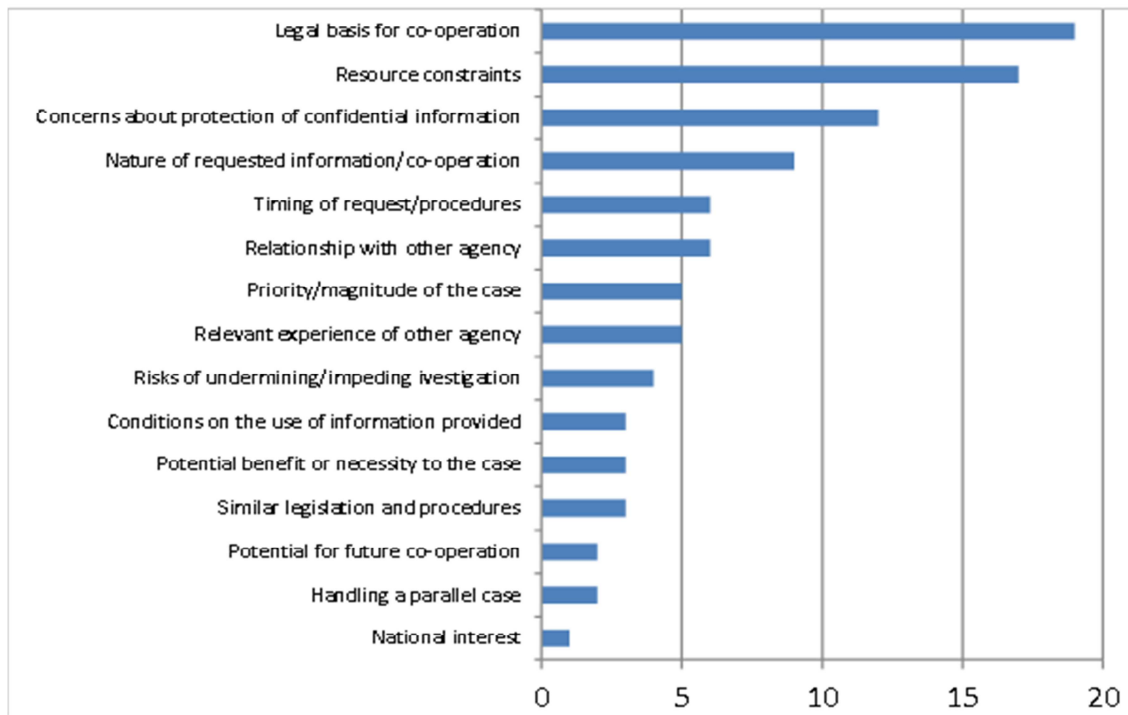


Figure 5. OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 56. (numbers = numbers of respondents)

Table 20: Factors considered in making a request for co-operation, by number of respondents

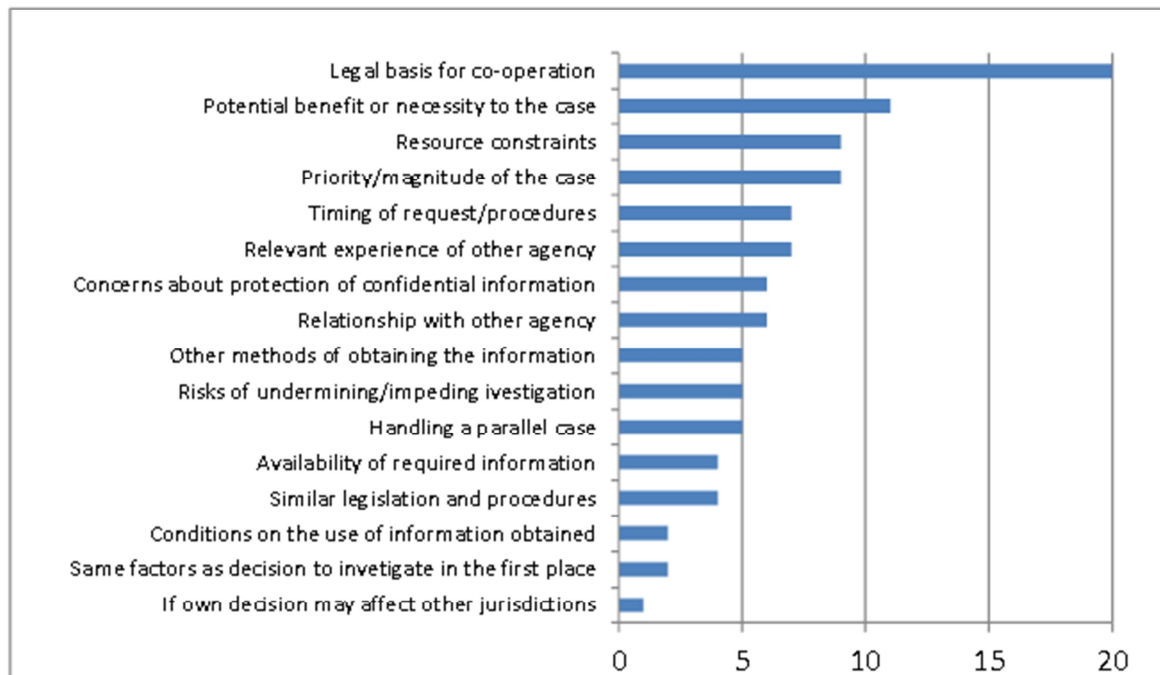


Figure 6. OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 55. (numbers = numbers of respondents)

It is remarkable how low the ‘potential benefit or necessity to the case’ scores as a factor in deciding whether to *provide* cooperation, while agencies score that factor extremely high when *making* a request. This demonstrates that competition agencies remain self-centred when cooperating and do not have ‘the greater (enforcement) good’ in mind. Moreover, also ‘potential for future cooperation’ seems of only minor importance when deciding to provide cooperation.

2.5.2 Assessment based on benchmarks

2.5.2.1 Limitation of negative externalities: conflict avoidance

International conflict in competition matters can be minimized through mainly three mechanisms. Dialogue from the start among authorities investigating the same case, the alignment of the timing of procedures, and the taking into consideration of external effects of domestic action.

First generation agreements provide for dialogue and information exchange, but are largely limited to generalities. The timing of such actions should be underlined more. Coordination during crucial decision making moments, for instance when deciding on remedies or their implementation, should be emphasised and encouraged. A particular commitment on the alignment of timing to the extent allowed within the domestic framework should be included. A distinction should thereby be made between different procedures in order to be as concrete and clear as possible. The information exchange provisions should more clearly indicate the types of information agencies can exchange, to stimulate mutual learning to the fullest extent without agencies feeling afraid of violating confidentiality rules.

Taking into account the effect of (the scope of) a certain investigation, or of the remedies imposed, is embedded in the negative comity provision. As mentioned, this provision is drafted with extreme caution. As the negative comity concept does not entail an obligation to act in a certain way, but merely to take non-domestic considerations into account, this limited obligation can be worded in stronger terms.¹⁰⁰⁷ Again, it is important that, either in the text of the agreement itself, or in an interpretative addendum, a non-exhaustive yet comprehensive list of examples of situations in which action would be appropriate is included. It is also advisable to indicate when negative comity has been employed in the press releases accompanying the closure of cases, to send a clear signal to companies under scrutiny as well as younger competition authorities that the concept is used, and more importantly, how it is used. This would also provide guidance to the judiciary when confronted with the argument that comity was not employed or not employed correctly.

2.5.2.2 Rationalisation of resources

The two main ways in which agencies can limit their spending via international cooperation, is via deference, by allowing another authority better placed to deal with the case to take on the investigation, and via efficiency increases.

A) Deference

¹⁰⁰⁷ For instance: “*Within the framework of its own laws and to the extent compatible with its important interests, each Party will take into account the important interests of the other Party, at all stages in its enforcement activities.*” Rather than ‘will seek to take into account’.

When talking about deference in the context of first generation agreements, one must make reference to the concept of positive comity as conceived in such agreements. The concept of positive comity takes up a central place in first generation agreements. As indicated, this principal feature does not function properly. According to former competition commissioner VAN MIERT, the 1991 EU-US Agreement amounted to “*a commitment by the EU and the USA to cooperate with respect to antitrust enforcement, and not to act unilaterally and extraterritorially unless the avenues provided by comity have been exhausted.*”¹⁰⁰⁸ This does not seem to correspond with reality, as demonstrated by the limited use of the latter concept.

As rightly pointed out by BERTELSMANN, while the concept of comity in principle offers the opportunity to make competition law enforcement more efficient and less costly by avoiding duplicative enforcement and reducing instances of potentially conflicting decisions, its potential is not realised as the concept is only very rarely used.¹⁰⁰⁹ Positive comity involving deferral shall only be possible in cartel cases, as the strict timing of a merger case makes deferral or suspension undesirable. Trust will moreover be hard to achieve in the absence of fundamental symmetry between the parties' antitrust laws and enforcement record. Where positive comity can be applied, it is crucial that there is transparency in the process. Delays or other obstacles in the investigation are magnified in case of opacity, and stimulate mistrust between parties, as it suggests that the investigation is not being conducted adequately or appropriately. Parties should feel assured throughout the entire process that their concerns are being addressed in a manner consistent with the premise of the bilateral accord.¹⁰¹⁰ While first generation agreements are careful not to change domestic laws or their interpretation and preserve the discretion of the parties involved, (positive) comity indeed requires a lot of trust as it implies that one authority fully relies on actions taken by a peer to address certain anticompetitive effects and acknowledges that another countries' interests take priority. One commenter to the AMC recognised the contrast between the relative success of US bilateral agreements and the comity provisions they contain.¹⁰¹¹ This seems somewhat contradictory as comity provisions take up a very central place in the agreements.¹⁰¹² The shortcomings in the application of the comity principle can be felt beyond the problems this creates in individual cases. It may send a negative signal to competition agencies across the globe when jurisdictions such as the US and the EU with very similar and well-developed competition regimes fail to visibly apply principles of comity.

Official attempts to modernize some of the cooperation mechanisms in first generation agreements have remained scarce and vague. While the EU did not attempt to undertake a general review, the AMC was mandated in 2004 to review US antitrust law and examine the need for modernization.¹⁰¹³

¹⁰⁰⁸ A. Jones & B. Sufrin, *EC Competition Law: Text, Cases and Materials*, 3rd ed., New York, Oxford University Press, 2008, 1390.

¹⁰⁰⁹ D. Garza, J. Yarowsky, B. Burchfield, W. S. Cannon, D. Carlton, M. Delrahim, J. Jacobson, D. Kempf, Jr., S. Litvack, J. Shenefield, D. Valentine, J. Warden, *Antitrust Modernization Commission - Report and Recommendations*, April 2007, available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (accessed May 2015), 221.

¹⁰¹⁰ International Competition Policy Advisory Committee Antitrust Division, ICPAC Final Report, 2000, available at <http://www.library.unt.edu/gpo/ICPAC/finalreport.htm> (accessed September 2015), Chapter 5.

¹⁰¹¹ D. Garza, J. Yarowsky, B. Burchfield, W. S. Cannon, D. Carlton, M. Delrahim, J. Jacobson, D. Kempf, Jr., S. Litvack, J. Shenefield, D. Valentine, J. Warden, *Antitrust Modernization Commission - Report and Recommendations*, April 2007, available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (accessed May 2015), 221.

¹⁰¹² Although it must be noted that US-style bilateral competition agreements have a slightly broader focus than EU-style dedicated agreements, often also containing technical assistance clauses.

¹⁰¹³ While the EU did issue a Report of the Group of Experts entitled ‘Competition policy in the new trade order: strengthening international cooperation and rules’, this report did not provide concrete steps to improve the concept of

It included in its aforementioned Report in 2007 a section on ‘Formal Agreements Incorporating Comity Principles’. It was suggested that more informal and efficient uses for comity should be developed and that comity principles should be extended to interactions with other nations with which no agreements exist.¹⁰¹⁴ This is not desirable or feasible. First, informal use of comity, while not entirely clear what this would entail, would most definitely be paired with a lack of transparency as well as visibility. Second, the extension of comity principles to countries with which no agreement has been concluded will prove to be extremely difficult. As interests need to be weighed off against one another, guidelines are very important. If these are lacking, the risk of each party consistently judging its own interests to be dominant will be even higher than when an agreement is in place. The concept of positive comity in particular presupposes a certain level of formality.

The AMC further stated that as the US continues to pursue increasing numbers of international agreements containing comity provisions, it should attempt to incorporate some core principles aiming to assign principal enforcement authority to the country most closely related to the activity at issue, while ensuring that other countries with an interest in the conduct are guaranteed that their interests are recognized. The first suggested principle is the principle of ‘complete deferral’, meaning that in case a cross-border transaction or conduct does not have a direct, substantial, and reasonably foreseeable anticompetitive effect on a particular country, that country should defer to the enforcement judgment of the country or countries where such an effect is present. This suggestion for modernization seems to be a misrepresentation of the effects doctrine as it exists in the FTAIA (see above, Part I, 3.2.1). When there is no direct, substantial and reasonable foreseeable anticompetitive effect, there is no jurisdiction in the US, and there can therefore be no question of deferral. The Report moreover does not add anything to the existing doctrine by for example clarifying when such an effect can be presumed to be present. The second suggestion is the principle of ‘presumptive deferral’. In this case, a competition authority in a country with a substantial nexus to a transaction or conduct may take enforcement action, while countries with a lesser connection should presumptively defer to that action. The former jurisdiction should then consult with the latter before taking action that will affect their significant interests. Again, this is not a novelty but a mere repetition of the positive comity principle as described in the 1998 EU-US Positive Comity Agreement, without any clarifications or improvements. The vagueness of this ‘modernization principle’ is underlined by the statement that the presumption may be overturned when there are ‘other compelling reasons’ for taking action, without a single clarification what such reasons might be. The next suggestion concerns harmonisation of remedies. Parties are not obliged to harmonise remedies entirely, but should rather seek to avoid imposing inconsistent or conflicting remedies. The AMC does not support a principle of deferral in this context, because this would allegedly require confidence in the fact that the jurisdiction acting first would be competent as well as free from political influence. Here as well additional clarity should have been provided. It is imaginable that many competition agencies with which the US authorities concluded a cooperation agreement can indeed be presumed to be competent and independent from political influence. This principle should be supported, according to the AMC, by a coordination mechanism. This would entail that private entities that may be confronted with inconsistent or conflicting rules or remedies regarding the same transaction or conduct can request consultation and/or coordination between or among jurisdictions to avoid or minimise any inconsistency or conflict. This mechanism is meant to ensure that where

comity, but took on a broader approach. European Commission, Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules – Report of the Group of Experts, COM(95)359 final, 12 July 1995.

¹⁰¹⁴ D. Garza, J. Yarowsky, B. Burchfield, W. S. Cannon, D. Carlton, M. Delrahim, J. Jacobson, D. Kempf, Jr., S. Litvack, J. Shenefield, D. Valentine, J. Warden, *Antitrust Modernization Commission - Report and Recommendations*, April 2007, 221.

countries fail to cooperate in the remedies phase, the entities subject to such remedies may nevertheless request that cooperation and consultation take place.¹⁰¹⁵ While the intentions are good, one could wonder what such a request would change, if parties failed to reach an agreement in the first place. It might also result in unwanted prolongation of the procedure.

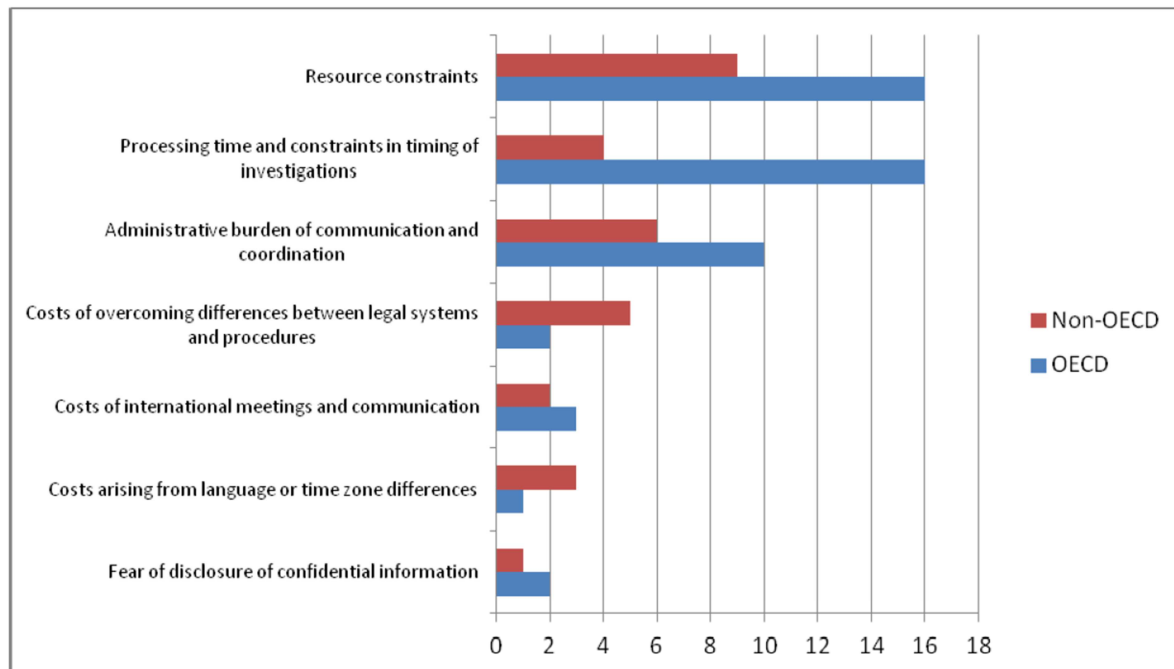
B) Efficiency increases

To what extent the efficiency of the investigatory process is increased via first generation agreements is discussed below. If higher efficiency is achieved, a logical consequence is that agencies will have to spend less resources (in terms of capital, human capital, and time), for instance because evidence gathering comes at less cost.

C) Cost of cooperation

What is not addressed in first generation agreements, but is potentially discussed during meetings between the agencies, is the issue of priority setting. Cooperation today generally takes place only when authorities are dealing with the same or related cases, when a part of the authorities' resources would have gone to such cases either way. It is a reality that case-cooperation will need to be prioritised based on the extent to which the benefits outweigh the costs of cooperation.¹⁰¹⁶ On a larger scale, the (increasing) cost of non-cooperation or uncoordinated enforcement is perhaps known too little by agencies and more importantly governments creating the legal working environment for these agencies. The OECD listed the costs of international cooperation:

Table 6: Costs of international co-operation, by OECD v non-OECD respondents



¹⁰¹⁵ Ibid., 220-225.

¹⁰¹⁶ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 32.

Figure 7. OECD, “Report on the OECD/ICN Survey on International Enforcement Co-operation”, DAF/COMP/WP3(2013)2, 26 February 2013, 31.

Resource constraints feature as biggest cost. The time and effort invested in supporting an investigation of another jurisdiction is still largely perceived as time and effort that is detracted from the domestic investigations, instead of an investment in building stronger enforcement across-borders.¹⁰¹⁷ It is suggested in the report on the OECD/ICN Joint Survey that a long-term perspective should be employed to assess the effectiveness of cooperation, and that high immediate costs should be considered an investment.¹⁰¹⁸ Overall the potential to reduce enforcement costs through international cooperation is high. More detailed information on such costs could provide the necessary incentive for the legal and institutional changes needed to address international anticompetitive practices more effectively and efficiently.¹⁰¹⁹

D) Cost of a formal agreement

As demonstrated, there was some confusion about the exact legal nature of bilateral competition cooperation agreements (see above, Part II, 2.3). While they are in fact binding international agreements, they are often called soft law instruments. The reality is that they constitute unenforceable hard law. First generation agreements are a confused hybrid, originating out of the 1994 *France v Commission* case, where the negotiators of the EU-US Agreement wanted to regard it as agency agreement, but competence rules and limited legal personality obstructed this. This translates into the low level of precision of the provisions in the agreements analyzed, combined with high formal obligation, diminished again by the wording of certain provisions in hortatory terms. Based on the generally weak obligations contained in first generation agreements, one would therefore incline to disagree with the choice of a binding treaty-form.

The current content of first generation agreements does not require a treaty form. Softer, informal agreements are then as efficient, at less cost. The availability of resources (human and capital) therefore may also determine the choice for soft law in the form of a Memorandum. States with little resources are likely to prefer soft commitments, as they can implement the agreement according to the resources they can commit to it at that moment in time.¹⁰²⁰ If the major obstacle when concluding an agreement is not how to ensure compliance, but how to reach agreement in the first place, a binding agreement does not have much added value. Furthermore, in the case of antitrust, a binding formal agreement does not offer significant political economy gains, as national interest groups (such as consumers, corporations, or industry organizations) often do not consider an international antitrust agreement to be a priority. Relevant interest groups are fragmented and have little agenda-setting capacity. Undertakings are selective about when they want antitrust agencies to work together. When domestic support is absent, there is little political gain for states when entering into a binding competition agreement. This may be one of the reasons why international antitrust cooperation is largely an agency-driven process, and strong commitments are unlikely, according to

¹⁰¹⁷ OECD, Issues paper by the secretariat, Limitations and constraints to international co-operation, DAF/COMP/WP3(2012)8, 23 October 2012, 13.

¹⁰¹⁸ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 8.

¹⁰¹⁹ OECD, Issues paper by the secretariat, Limitations and constraints to international co-operation, DAF/COMP/WP3(2012)8, 23 October 2012, 14.

¹⁰²⁰ K. Abbott & D. Snidal, “Hard and Soft Law in International Governance”, *International Organization*, Vol. 54, No. 3, 2000, 432-433.

BRADFORD.¹⁰²¹ As mentioned, however, international agreements do not only require technical knowledge, but must also take into account cultural differences. Certain parties adhering to a more formalistic culture, in particular in the East, prefer formal treaties over MoUs, because of the symbolic value.

2.5.2.3 Increased effectiveness and efficiency of investigations

International cooperation can increase the effectiveness and efficiency of investigations in several ways. Prior to any investigation, cooperation in the form of notifications makes it possible to be aware (more quickly) of potential anticompetitive practices affecting the domestic jurisdiction but taking place abroad. This mechanism was merely formalised in the 1991 EU-US Agreement, but has had effect nevertheless. While in the year prior to the agreement the EU received 4 notifications from the US while sending out 2, these numbers increased to respectively 60 and 40 in the first two years after the agreement.¹⁰²²

Notification starts the cooperation process, but is relatively futile on its own. The most significant effect of international cooperation will take place during the investigation, in the form of coordination and information exchange. The 1991 EU-US Agreement leaves the parties the broadest discretion. National laws, national interests, or resource concerns may all justify a refusal to render assistance. It is clarified which factors should be taken into account when deciding on whether or not to coordinate, but it is not clarified what this coordination could entail. The Agreement may therefore inadvertently provide more information with regard to refusal to cooperate, rather than positive examples of cooperation activities.

A general obligation to cooperate is not feasible nor desirable. Cooperation should be tailored to the case, both for the benefit of the case and in order to keep enforcement officials motivated and not buried under standardised cooperation applications. Some discipline should nevertheless be present. Positive examples of possible actions in support of another authority, be it in the agreement itself or in an interpretative annex, might provide extra incentives for agencies to consider cooperation. The Best Practices in Merger Cooperation for instance are already far more detailed than the 1991 EU-US Agreement, and are generally considered successful. Information exchange provisions in first generation agreements only increase effectiveness and efficiency to a very limited extent, as this exchange is restricted to non-confidential information unless the party providing the information consents to the exchange. Here as well, more information should be given on which information agencies *can* exchange without consent, in order to stimulate such behaviour and instruct those who are not part of the agreement. The fact that confidential information cannot be exchanged, limits the benefits that could be attained by the agreement. Companies will still be able to engage in strategic behaviour towards competition agencies, although the extent to which they do so is hardly measurable.

2.5.2.4 Increased transparency and legal certainty

¹⁰²¹ A. Bradford, “International Antitrust Cooperation and the Preference for Nonbinding Regimes” in A. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 338-340.

¹⁰²² J. Griffin, “EC/U.S. antitrust cooperation agreement: impact on transnational business”, *Law & Policy in International Business*, Vol. 24, 1992-1993, 1063.

DIECKMANN underlined another benefit of bilateral agreements, namely the transparency that is created by institutionalising existing practices, thereby allowing other agencies to learn from the agreement as well.¹⁰²³ While informal cooperation can be highly effective, it is often opaque. Formalising practice in an agreement opens up the process. First generation agreements contribute significantly to the transparency of international cooperation, but there is room for improvement. The agreements can be more specific about what they want to achieve, and should provide clear procedures rather than vague generalities, in order to significantly improve the predictability of the legal environment. Again, an interpretive addendum could provide additional clarity and add substance to the agreements.

2.5.2.5 Overcoming practical issues

It is evident that not all practicalities should be regulated in an agreement, but it may benefit parties to have more detailed, formal structures in place to work along. Parties could agree on working languages, and more importantly on common definitions and terminology. Definitions in the EU's first generation agreements are present, but limited. While the EU's first generation agreements are concluded with parties that have more or less similar competition law systems in place, explicit agreement on definitions can take away much confusion in the cooperation process. The Agreement specifies in Article X that communications under the Agreement may be carried out by direct oral, telephonic, written or facsimile communication, apart from notifications under Articles II, V and XI, and requests under Article VII, which should be confirmed in writing through diplomatic channels. Nothing is said on who bears the cost for cooperation, for instance translation costs or other expenses.

2.5.2.6 Decreased burden for companies

The survey sent out in the framework of this study revealed that the (procedural) burden for undertakings involved in antitrust cases is perceived by all firms to have increased over the years, due to evolving and more complex standards, differences in pace of evolution of each authority, as well as simply the increased number of jurisdictions actively investigating antitrust cases. In international cartel cases, law firms almost unanimously mentioned differing requirements to obtain and maintain leniency as the main obstacle to effectively and efficiently solving an international case. The biggest impediment to effectively and efficiently resolving international merger cases were increasing transaction costs due to differing information requirements, jurisdictional rules for making filings, different standards of review, timing issues, different degrees of interventionism/protectionism, languages, cultural differences, unreasonable information requirements, lack of transparency and lack of engagement from case teams.¹⁰²⁴ Cooperation agreements have not led to a significant alignment of procedures that would tangibly diminish this burden. When companies waive their confidentiality rights, they allow competition authorities to communicate extensively, and in this scenario a cooperation agreement may be of aid as it provides the structures in which these discussions can take place. The extent to which agencies reach compatible remedies in merger cases via international cooperation, thereby benefitting the companies involved, is not measurable in the framework of this study and therefore not discussed.

¹⁰²³ H. Dieckmann, "The Benefits of Cooperation between Competition Authorities", Inaugural Symposium of the Competition Policy Research Center, Tokyo, 2003, 1, at <http://www.jftc.go.jp/cprc/DP/CPDP-9-E.pdf>, (accessed December 2011).

¹⁰²⁴ Result of author's law firm survey (see Annex I).

2.5.2.7 Discipline

A dedicated agreement is often perceived to create more of a framework for cooperation than a non-binding recommendation would.¹⁰²⁵ Despite the modest obligations in first generation agreements, repeated interaction in this framework may result in workable structures and procedures for cooperation.¹⁰²⁶ First generation agreements are also seen to install a certain discipline to cooperate into the parties. Importantly, responses to the 2001 OECD questionnaire on international cooperation indicated that cooperation seems to occur more among jurisdictions that are parties to a formal cooperation agreement.¹⁰²⁷ If a competition authority dedicates resources to the negotiation of a bilateral agreement with a foreign peer, return on investment will be maximised by cooperating as frequently as possible and desired. Bilateral agreements seem to have played an important role in particular during the early days of international cooperation. First generation agreements helped create momentum and solidify an ‘atmosphere of cooperation’ by institutionalizing international cooperation to a certain extent and creating a structured framework facilitating policy dialogue and case-related cooperation.¹⁰²⁸ They created a cooperative dynamic.¹⁰²⁹ According to a Commission official it is not so much the content of the agreements that matters, but the mere fact that they exist.¹⁰³⁰ However, it is very likely that this increased cooperation results from the nature of the pre-existing relationship between the parties rather than the EU-US Agreement itself. Inherently, the Agreement does little to install discipline in the cooperation-process. As demonstrated, provisions remain vague and general, and rather than providing examples and incentives for positive action, the complete discretion of the parties is underlined at several occasions. ZANETTIN claimed that the utility of bilateral agreements lay in the fact that they created the incentive and motivation to cooperate, even though they are not legally necessary for cooperation to take place.¹⁰³¹ However, while being able to rely on a legal basis will indeed be an important factor in deciding to cooperate, as demonstrated by the above tables, it will not create the incentive to do so. It is instead the needs of the case that create the incentives and motivation to cooperate, not the mere existence of an agreement. The *Sun/Oracle* case for instance demonstrates that if the stakes are too high, cooperation will fail (see below, Part II, intermediate conclusion). To exemplify this, one can look at the aforementioned *Microsoft* cases (see above, Part I, 2.2.5). While the first *Microsoft* case was praised by the European Commission and the Assistant Attorney General at the time as respectively “*a historic and unprecedented piece of co-operation between the EC Commission and the United States*” and “*a powerful message to firms around the world that the antitrust authorities of the US and the European Commission are prepared to move decisively and promptly to pool resources to attack conduct by multinational firms that violate the antitrust laws of the two jurisdictions*”,¹⁰³² the second wave of *Microsoft* cases, beginning in 1998, exactly the year in which the

¹⁰²⁵ H. Dieckmann, “The Benefits of Cooperation between Competition Authorities”, Inaugural Symposium of the Competition Policy Research Center, Tokyo, 2003, 1, at <http://www.jftc.go.jp/cprc/DP/CPDP-9-E.pdf>, (accessed December 2011), 5.

¹⁰²⁶ D. Klawiter & C. Laciak, “International Competition Cooperation: No Longer Just the Formal Agreements”, *The Antitrust Review of the Americas, A Global Competition Review Special Report*, 2003, 25.

¹⁰²⁷ F. Jenny, “International Cooperation on Competition: Myth, Reality and Perspective”, *The Antitrust Bulletin*, Vol. 48, Winter 2003, 991.

¹⁰²⁸ OECD, Discussion on Limitations and Constraints to International Co-operation, Contribution of the European Union, DAF/COMP/WP3/WD(2012)41, 23 October 2012, 3.

¹⁰²⁹ Interview with Commission official.

¹⁰³⁰ Interview with Commission official.

¹⁰³¹ B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 81.

¹⁰³² *Ibid.*, 83.

positive comity agreement was concluded between the EU and US, witnessed much less intense cooperation between the EC and US authorities.¹⁰³³

3. Second generation agreements: ignoring crucial issues

In 1999, in a speech concerning international antitrust law and policy, DIANE WOOD stated that in her experience, the main reason “*why more and better cooperation does not yet occur between national authorities can be summed up in a word: confidentiality.*”¹⁰³⁴ A large majority of jurisdictions indeed has regulations in place prohibiting or severely restricting confidential information exchange among competition authorities.¹⁰³⁵ The EU’s first generation agreements with the US, Canada, Japan and South-Korea did not address this issue, as such agreements do not override national confidentiality laws. Legal limitations to the exchange of confidential information among competition agencies have since long been identified as ‘the primary impediment’ to international cooperation.¹⁰³⁶ This call for improved information exchange possibilities was answered by some jurisdictions in the form of so-called second generation agreements, sometimes referred to as antitrust mutual assistance agreements (AMAA).¹⁰³⁷ This section assesses the EU-Switzerland Agreement, the first and only second generation agreement concluded so far by the EU, which can be considered to represent the EU-model for this type of agreement.¹⁰³⁸ The EU is currently negotiating a second generation agreement with Canada, and plans to initiate similar negotiations with Japan and later Korea. A second generation agreement with the US is currently not considered necessary in view of the needs of the case-handlers and a lack of political support due to the divergence of the competition law systems with regard to data protection. As an example pre-merger filing is mentioned. In the US such filing is criminally protected, while it is published in the EU.¹⁰³⁹

¹⁰³³ Ibid. Also see *United States v Microsoft Corp.*, 253 F.3d 34 (DCC, 2001); DoJ Press Release, “Department of Justice and Microsoft Corporation Reach Effective Settlement on Antitrust Lawsuit”, 01-5692, November 2001; European Commission, Press Release, “Commission opens proceedings against Microsoft’s Alleged Discriminatory licensing and refusal to supply software information”, IP/00/906, Brussels, 3 August 2000; European Commission, Press Release, “Commission initiates additional proceedings against Microsoft”, IP/01/1232, Brussels, 30 August 2001.

¹⁰³⁴ Diane Wood, Luncheon speech, “Is cooperation possible?”, (2000) *New England Law Review*, Vol. 34:1, 109. Not only WOOD expressed her concerns about the lack of exchange of confidential information, also see OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Background Note, DAF/COMP/GF(2012)6, 13 February 2012, 3, and ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 5.

¹⁰³⁵ The 2012 ICN/OECD Joint Survey on International Competition Cooperation indicated that 52 respondents (including all OECD respondents) had rules that protect confidential information in possession of the national competition agency, and generally prevent the agency from disclosing this information to the parties to an investigation, to third parties, and to other enforcement agencies. OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 89. In the EU the main relevant provisions are Article 339 TFEU, Article 28 of Regulation 1/2003 and Article 17 of Regulation 139/2004 (see below, Part II, 3.2.1.1).

¹⁰³⁶ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 15.

¹⁰³⁷ In particular in a common law context.

¹⁰³⁸ Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, Brussels, 17 May 2013 (EU-Switzerland Agreement). Also see European Parliament Resolution on EU Cooperation Agreements on Competition Policy Enforcement – The Way Forward, 2013/2921(RSP), 5 February 2014. A Commission official confirmed that the EU-Canada second generation Agreement will be similar to the EU-Switzerland second generation Agreement and that The latter agreement can be considered a model for future cooperation. Interview with Commission official.

¹⁰³⁹ Interview with Commission official.

While the focus is on the EU's approach to confidential information exchange among enforcers, the US-Australia second generation Agreement serves as an occasional point of reference throughout.¹⁰⁴⁰ Among the existing non-EU second generation agreements,¹⁰⁴¹ the US-Australia Agreement was selected inter alia because of its level of detail compared to information exchange provisions in other agreements.¹⁰⁴² Moreover, the US has long been a proponent of bilateral competition cooperation and concluded the Agreement with Australia already in 1999. This time-frame permits more than a mere theoretical assessment of the Agreement, and allows implementation issues to be included in the scope of scrutiny, which is rather difficult for the much more recent EU-Switzerland Agreement. Also, as will be demonstrated, the US has approached confidential information exchange in a different way than the EU. As the EU's management plans indicated that second generation agreements would be used more often in the future, it is interesting to see how this type of agreement is conceptualised and implemented elsewhere, in particular when it involves a major trading partner of the EU and a competition law giant. It should be emphasised that it is not the intention to engage in a systematic comparison of the EU and the US model agreements. This would be both undesirable and methodologically unsound, considering the different legal contexts in which the agreements operate.

3.1 A strong call for intensified cooperation

Information exchange is a central feature of international enforcement cooperation and legally protecting information from being disclosed is crucial for competition agencies to be able to compel information in competition investigations. Confidentiality rules are therefore fundamental components of an agency's ability to obtain information, be it from an undertaking or a foreign agency.¹⁰⁴³ A balance must therefore be found between the different interests at stake. The OECD has been particularly active in this matter. In 1984, the OECD Competition Paper on International Co-operation in the Collection of Information underlined the importance of suitable procedures enabling competition authorities to obtain sufficient information to evaluate the effects and legality of commercial activities. It was therefore recommended that OECD members should exchange relevant information in so far the national interests permitted disclosure. It was added that in case

¹⁰⁴⁰ Agreement between the government of the United States of America and the government of Australia on mutual enforcement assistance, Washington, 27 April 1999 (US-Australia Agreement).

¹⁰⁴¹ The exchange of confidential information is also possible between the competition agencies of Denmark, Norway, Iceland and Sweden (Agreement between Denmark, Iceland, Norway and Sweden concerning Cooperation in Matters of Competition, Copenhagen, 16 March 2001. Sweden acceded to the convention in an agreement on amendments, signed on 9 April 2003), as well as those of Australia and New Zealand (Cooperation and Coordination Agreement between the Australian Competition and Consumer Commission and the New Zealand Commerce Commission, Wellington, 31 July 1994, updated in 2007 and 2013; Cooperation Arrangement between the New Zealand Commerce Commission and the Australian Competition and Consumer Commission in relation to the Provision of Compulsory-acquired Information and Investigative Assistance, Sydney, 19 April 2013). In April 2015, the Japanese JFTC and Australian ACCC concluded an agreement allowing the exchange of confidential information among their competition authorities (Cooperation Arrangement between the Fair Trade Commission of Japan and the Australian Competition and Consumer Commission, Sydney, 29 April 2015). This is the first 'second generation' agreement for the JFTC. See European Parliament, Directorate-General for Internal Policies, Policy Department A – Economic and Scientific Policy, Competition Policy in International Agreements – Study for Econ Committee, IP/A/ECON/2015-02, August 2015, 18.

¹⁰⁴² Article IV of the Denmark-Norway-Iceland-Sweden second generation Agreement for instance merely states that it is in the common interest of the parties to exchange classified information (without providing a definition of the latter), and that this is subject to three requirements: a confidentiality obligation, a limitation on its use, and further transmission is only authorized after explicit consent of the competition authority that provided the information.

¹⁰⁴³ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 12.

confidentiality restrictions obstructed such cooperation, OECD members should consider the necessary and appropriate enabling measures and confidentiality assurances allowing for international information exchanges among competition authorities.¹⁰⁴⁴ The OECD's 1998 Council Recommendation Concerning Effective Action against Hard Core Cartels goes beyond the 1984 paper by advising members to gather confidential or non-confidential information on behalf of a foreign agency, if necessary even employing compulsory means. It equally recommended to share confidential or non-confidential investigatory information that was already on file.¹⁰⁴⁵

The OECD subsequently issued questionnaires to competition agencies on international cooperation in anti-cartel enforcement. The responses indicated that the main reasons for limited cooperation, in particular prior to 1999, were first, that many cartel cases prosecuted at that time did not have an international dimension, but second, *“that where cooperation would have been useful it was significantly constrained by the inability of the members to disclose confidential information to foreign agencies.”*¹⁰⁴⁶ The *Marine Hose* cartel case for instance is often mentioned as an example of successful international cooperation between the UK, US and EU competition authorities.¹⁰⁴⁷ Japanese representatives, however, pointed to the fact that cooperation in this case was limited to the coordination of dawn raids due to confidentiality constraints. The JFTC was finally only able to collect evidence from the foreign cartel participants pursuant to cooperation with their Japanese counsel.¹⁰⁴⁸ The outcome of the more recent

¹⁰⁴⁴ OECD, International Co-operation – Stocktaking Exercise of the Competition Committee's Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 34.

¹⁰⁴⁵ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 25-26.

¹⁰⁴⁶ F. Jenny, “International cooperation on competition: myth, reality and perspective”, University of Minnesota law school conference on global antitrust law and policy, Minneapolis, 20-21 September 2002, 12.

¹⁰⁴⁷ OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Background Note, DAF/COMP/GF(2012)6, 13 February 2012, 25. Marine hose is a type of rubber hose used to transport crude oil in oil and defence industries. Suppliers of such hoses in Japan, the UK, Italy and France formed a global cartel lasting from 1986 to 2007 that engaged in price-fixing, market-sharing, customer allocation, restricting supplies and bid rigging for marine hose and ancillary products. The cartel was led by a full-time coordinator in the form of an independent UK consultant. Several competition authorities, including the OFT, the European Commission, the US DOJ and the JFTC took coordinated enforcement action, both during their initial investigations and subsequently. Arrests executed by the DOJ coincided with business and domestic searches carried out by the OFT, as well as on-site inspections by the Commission. (OECD, Global Forum on Competition, “Improving International co-operation in cartel investigations, Contribution from the United Kingdom, DAF/COMP/GF/WD(2012)19, 23 December 2011.) In the US as well as in Europe raids were carried out at various premises. (Ince, Sarah & Christian, Gordon, “UK: The Marine Hose Cartel: A New Era In International Co-Operation”, *Mondaq*, 25 February 2008.) Following the completion of the OFT's enforcement action, the ACCC successfully made a formal request for information in accordance with the relevant Memorandum of Understanding and Part 9 of the Enterprise Act. In the formal ACCC proceedings in the Australian Federal Court material disclosed to it by the OFT was used in evidence. Investigations were separate but coordinated. Ongoing coordination involved strategy and timing, simultaneous searches and arrests, and coordination of searches. Sources of evidence were both common and separate. While there were some constraints for sharing such evidence, use was made of waivers and ‘pragmatic solutions’. (<http://www.internationalcompetitionnetwork.org/uploads/library/doc729.pdf> (accessed June 2017)). The international cooperation in the *Marine Hose* case was remarkable for one particular aspect as well, in addition to the overall level of cooperation in the case. The Antitrust Division in 2007 filed plea agreements with three British nationals calling for severe jail sentences. For the first time, these agreements anticipated and addressed the criminal prosecution of the defendants for a cartel offense in a foreign jurisdiction. The resulting charges in the UK were the first criminal cartel offenses charged under the 2002 Enterprise Act. Global coordination and enforcement resulted in successful prosecutions and other actions in *inter alia* the United States, Australia, Japan, the UK and the EU. (Fox, Eleanor & Crane, Daniel, *Global Issues in Antitrust and Competition Law*, St. Paul, Thomson Reuters, 2010, 91-92.)

¹⁰⁴⁸ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 310-311.

OECD/ICN Joint Survey revealed a repeated call from agencies for a clear and common legal framework for the exchange of confidential information, with well-defined conditions and adequate safeguards. The area was identified as in need for improvement, in particular with regard to the identification of the type of information that can be exchanged, as well as the conditions for transmission and use. To address what is essentially a structural problem, solutions suggested were also structural, including the adoption of national legislation or international instruments, but these remained vague.¹⁰⁴⁹

In a 1999 Report to the OECD Council Concerning Hard Core Cartels, the benefits and costs of information sharing between enforcers in the context of cartel investigations were more elaborately discussed. Such benefits should not be seen as an immediate return-on-investment in every instance of cooperation. Exchange of (confidential) information should result in improved enforcement capacities in general due to enhanced evidence gathering abilities, increased awareness, and benefits from cases brought by foreign agencies as well as overall reduction in hard core cartel activity and quicker and more complete merger review. The report also mentioned that even purely domestic enforcement could benefit from confidential information received from a foreign agency as such information could contain ‘tips’ about previously unsuspected conduct, or could establish that domestic activities relating to an international cartel violated domestic laws and caused domestic harm.¹⁰⁵⁰

Some five years ago it was said that the spirit of cooperation was at its brightest ever,¹⁰⁵¹ and that the taboo on confidential information exchange in competition cases was less present than in the past.¹⁰⁵² In the meantime, however, the US elections and impending Brexit may have dimmed this optimism.¹⁰⁵³ The number of second generation agreements is scarce, and their use appears limited as well. States therefore still seem averse towards confidential information exchange. Many concerns are uttered by both governments and the business community to such cooperation.¹⁰⁵⁴ According to the OECD confidential information exchange among competition authorities is one of the most sensitive areas of international cooperation.¹⁰⁵⁵ This is demonstrated by OECD research on the factors considered by competition authorities when deciding whether or not to cooperate, which indicates that concerns about the protection of confidential information form the third most crucial consideration when deciding whether or not to cooperate, as demonstrated by the table below.

¹⁰⁴⁹ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 101.

¹⁰⁵⁰ OECD, International Co-operation – Stocktaking Exercise of the Competition Committee’s Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 36.

¹⁰⁵¹ J.F. Wayland, “International Cooperation at the Antitrust Division”, International Bar Association’s 16th Annual Competition Conference, 14 September 2012, Florence, 6.

¹⁰⁵² B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 144.

¹⁰⁵³ This again underlines the importance of formal, binding agreements in ensuring that political or administrative fluctuations do not disrupt the cooperative process.

¹⁰⁵⁴ One example is the discussion on confidential information exchange within BIAC, the Business and Industry Advisory Committee to the OECD.

¹⁰⁵⁵ OECD, Issues paper by the secretariat, Limitations and constraints to international co-operation, DAF/COMP/WP3(2012)8, 23 October 2012, 4-5.

Table 21: Factors considered in providing co-operation

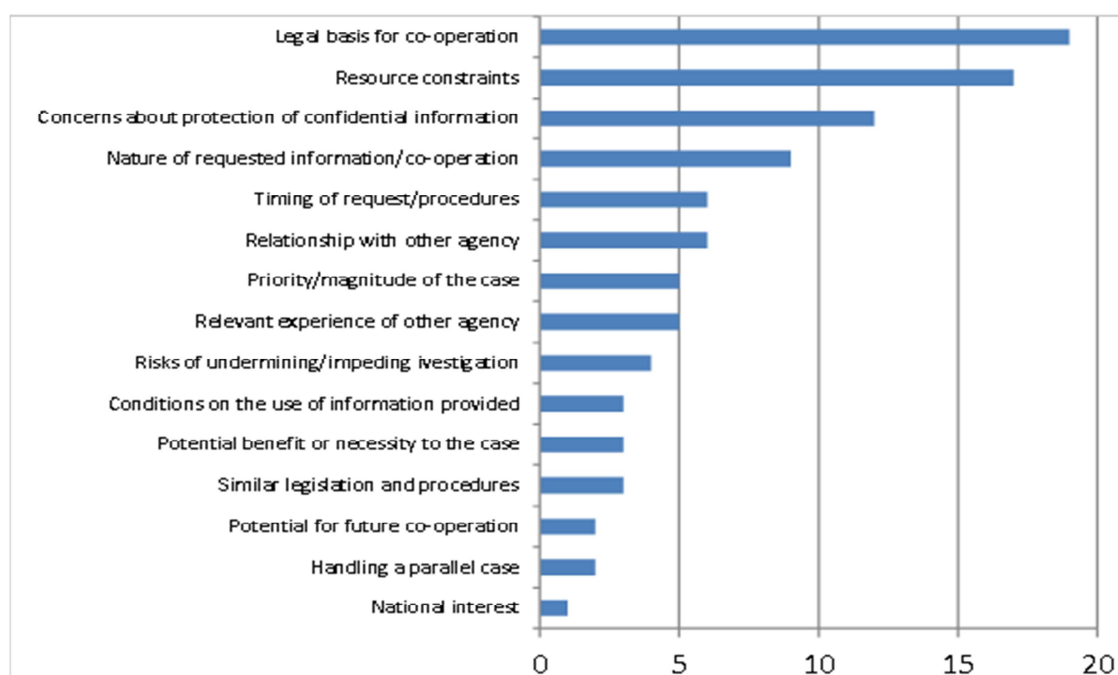


Figure 8. OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 56. (x-axis = numbers of respondents in absolute terms)

The origins of some of these concerns can be found in the differences in confidentiality rules, data protection rules, and competition rules across jurisdictions. One particular issue is the lack of a common definition of confidential information. As the exchange of confidential information is often prohibited or severely limited, the discussion consequently revolves around the qualification of the requested information. An added difficulty is that confidentiality rules are sometimes set in horizontal national legislation, or dispersed over different sets of rules, making the system even more difficult to grasp (see below, Part II, 3.4).¹⁰⁵⁶ Similar problems arise as a consequence of differences in the scope and application of legal privileges, such as the legal professional privilege.¹⁰⁵⁷ Some of these concerns will be rendered more concrete in the next section, where it is assessed whether the safeguards in the EU-Switzerland Agreement sufficiently address such issues.

3.2 The EU-Switzerland second generation Agreement

Before embarking on an assessment of the safeguards present in the EU-Switzerland Agreement, the present section first explores its content, with occasional reference to the US-Australia Agreement. Similar to the analysis of the first generation agreements in Part I, first the context of conclusion is sketched, followed by an analysis of the content and the legal nature of the agreements. Finally, the use of the agreements is scrutinized. This offers an understanding of both the EU's and the US' approach to confidential information exchange.

¹⁰⁵⁶ OECD, Discussion on Limitations and Constraints to International Co-operation, Contribution of the European Union, DAF/COMP/WP3/WD(2012)41, 23 October 2012, 3-4.

¹⁰⁵⁷ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 44.

3.2.1 Context of conclusion

3.2.1.1 Confidentiality rules in the EU

In order to fully comprehend the scope of the EU-Switzerland Agreement, it should first be established to what extent confidential information is protected and the Commission is prevented to share confidential information with competition agencies in third countries in the absence of a second generation agreement.¹⁰⁵⁸ While it is outside of the scope of this study to fully assess the EU's confidentiality rules on their merit, it will be demonstrated that in the EU as well as in the US, confidentiality rules are very dispersed and allow for little transparency. It is important that this is remedied in second generation agreements.

The General Court in *Bank Austria Creditanstalt* confirmed that open decision making is the principle in the EU (as it was enshrined in former article 1 TEC and reflected in former article 255 TEC – now article 15 TFEU), and that therefore any exception to this principle should be interpreted strictly.¹⁰⁵⁹ This was confirmed in *Pergan Hilfsstoffe*.¹⁰⁶⁰ The basic Treaty provision dealing with professional secrecy is Article 339 TFEU (former Article 287 TEC): “*The members of the institutions of the Union, the members of committees, and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.*” The obligation of professional secrecy can therefore be summarised as a general responsibility not to disclose information that was received in an official capacity.¹⁰⁶¹ According to GIANNAKOPOULOS, confidentiality rules do not only aim to protect private parties from ‘indiscretions or leaks’ by the government, but also ensure that firms cannot use commercial sensitivity as an excuse for withholding relevant information from inspecting officials.¹⁰⁶² The Court also confirmed that the professional secrecy rules are intended to protect the rights of defence of undertakings.¹⁰⁶³ The Court of First Instance at the time further clarified that what is now Article 339 TFEU does not require the Commission to prohibit third parties from producing, in national legal proceedings, documents received in the procedure before the Commission which contain confidential information and business secrets, but that it must take all necessary precautions to guarantee that during the transmission of documents to the national courts such information remains protected.¹⁰⁶⁴ There is a presumption that the national courts will guarantee the protection of confidential information, “*since,*

¹⁰⁵⁸ On the definition of confidential information, see below, Part II, 3.4.

¹⁰⁵⁹ “*in the absence of provisions explicitly ordering or prohibiting publication, the power of the institutions to make acts which they adopt public is the rule, to which there are exceptions in so far as Community law, in particular through provisions ensuring compliance with the obligations of professional secrecy, prevents disclosure of such acts or of certain information contained therein.*” Judgment of 30 May 2006, *Bank Austria Creditanstalt AG v Commission of the European Communities*, T-198/03, EU:T:2006:136, paragraph 69.

¹⁰⁶⁰ “[...] *in the absence of provisions explicitly ordering or prohibiting publication, the rule is that the institutions have a power to publish acts which they adopt. However, there are exceptions to that rule in so far as Community law, in particular through provisions ensuring compliance with the obligation of professional secrecy, prevents disclosure of such acts or of certain information contained in them.*” Judgment of 12 October 2007, *Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission*, T-474/04, EU:T:2007:306, paragraph 61.

¹⁰⁶¹ OECD, Discussion on how to define confidential information, Contribution of the European Union, DAF/COMP/WP3/WD(2013)57, 29 October 2013, 2-3.

¹⁰⁶² T. Giannakopoulos, *Safeguarding companies' rights in competition and anti-dumping/anti-subsidies proceedings*, 2nd ed., Alphen aan den Rijn, Kluwer Law International, 192.

¹⁰⁶³ Judgment of 17 October 1989, *Dow Benelux NV v Commission of the European Communities*, 85/87, EU:C:1989:379, paragraphs 17 and 18; Judgment of 16 July 1992, *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and others*, C-67/91, EU:C:1992:330, paragraph 35.

¹⁰⁶⁴ Judgment of 18 September 1996, *Postbank NV v Commission of the European Communities*, T-353/94, EU:T:1996:119, paragraph 89.

*in order to ensure the full effectiveness of the provisions of Community law in accordance with the principle of cooperation [...], these authorities are required to uphold the rights which those provisions confer upon individuals.*¹⁰⁶⁵

If Member State courts request information from the Commission, such information may be either public or confidential. The *Postbank* case, however, explained that this cooperation may not lead the Commission to breach its duty of professional secrecy, meaning that the Commission may only transmit information covered by its obligation of professional secrecy if the national court can provide sufficient guarantees of non-disclosure. If the court cannot do so, the Commission is entitled to refuse disclosure. In summary, the Commission does not breach its obligation of professional secrecy by allowing disclosure to national judicial authorities, but it does so if it does not take the necessary precautions.¹⁰⁶⁶ Article 339 TFEU explicitly refers to the category of ‘information about undertakings, their business relations or cost components’, reflecting the distinction made in secondary legislation between ‘business information’ and ‘other confidential information’ (see below, Part II, 3.4.2). The qualification of a document as confidential does not prevent its disclosure in proceedings under Articles 101 and 102 TFEU, according to the Commission, if such information constitutes either an inculpatory document or an exculpatory document. In such a case, the rights of defence of the parties in the form of access to the Commission’s file may outweigh the interest in protecting confidential information.¹⁰⁶⁷ Article 41 of the Charter of Fundamental Rights mentions that the right to good administration includes the right to have access to the file, while taking the legitimate interests of confidentiality and of professional and business secrecy into account. This indicates again that there is no absolute protection, but that a balance needs to be established between the legitimate interests of the parties at stake. There is, however, some discussion on whether this right exists only for natural persons, or for undertakings as well (see below, Part II, 3.4.3).

The obligation of professional secrecy is implemented in the field of competition law and extended to member state officials via Articles 27 and 28 of Regulation 1/2003 and Articles 17 and 18 of Regulation 139/2004.¹⁰⁶⁸ Access to confidential information is restricted to varying extent for both third parties as well as the parties to proceedings. The right of access to the file of a party to competition proceedings is not absolute. According to Article 27 (2) of Regulation 1/2003 it does not extend to ‘confidential information and internal documents of the Commission or the competition authorities of the Member States.’¹⁰⁶⁹ Except with regard to a restricted form of information exchange within the European Competition Network (see below, Part III, 2.1.5) and cooperation with national courts, information collected under Regulation 1/2003 may be used only

¹⁰⁶⁵ Ibid., paragraph 69.

¹⁰⁶⁶ Ibid., paragraph 92; also see I. van Bael, *Due Process in EU Competition Proceedings*, Alphen aan den Rijn, Wolters Kluwer, 2011, 388-389.

¹⁰⁶⁷ T. Giannakopoulos, *Safeguarding companies’ rights in competition and anti-dumping/anti-subsidies proceedings*, 2nd ed., Alphen aan den Rijn, Kluwer Law International, 208.

¹⁰⁶⁸ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003; Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004.

¹⁰⁶⁹ This was confirmed in Judgment of 15 October 2002, *Limburgse Vinyl Maatschappij NV (LVM), DSM NV and DSM Kunststoffen BV, Montedison SpA, Elf Atochem SA, Degussa AG, Enichem SpA, Wacker-Chemie GmbH and Hoechst AG and Imperial Chemical Industries plc (ICI) v Commission of the European Communities*, Joined cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 315; Judgment of 7 January 2004, *Aalborg Portland A/S, Irish Cement Ltd, Ciments français SA, Italcementi - Fabbriche Riunite Cemento SpA, Buzzi Unicem SpA and Cementir - Cementerie del Tirreno SpA v Commission of the European Communities*, Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 68; Judgment of 25 October 2011, *Solvay SA v European Commission*, C-110/10P, EU:C:2011:687, paragraph 49.

for the purpose for which it was acquired. The Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States may in principle not disclose information acquired or exchanged by them pursuant to the regulation and of the kind covered by the obligation of professional secrecy.¹⁰⁷⁰ Similar rules apply in mergers cases falling under Regulation 139/2004. This obligation of confidentiality imposed on the Commission, however, is without prejudice to the provision of Article 27 of Regulation 1/2003, governing the right to be heard, as well as the right of access to the Commission's file.¹⁰⁷¹ Nevertheless, it will be difficult for (third) parties to obtain more comprehensive access to the Commission's file than that to which they are entitled under the specific competition law regulations. The CJEU sees to it, when balancing the different interests at stake, that the arrangements for access to the file instituted by the specific regulations in the field of competition law are not undermined by a generalised right of access.¹⁰⁷²

In Commission Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty (currently Articles 101 and 102 TFEU), the protection of confidential information is repeatedly ensured.¹⁰⁷³ According to the Regulation, when complainants participate in the proceedings, they shall only be given a copy of the non-confidential version of the statement of objections.¹⁰⁷⁴ Furthermore, when the Commission intends to reject a

¹⁰⁷⁰ Article 28 Regulation 1/2003.

¹⁰⁷¹ T. Giannakopoulos, *Safeguarding companies' rights in competition and anti-dumping/anti-subsidies proceedings*, 2nd ed., Alphen aan den Rijn, Kluwer Law International, 195.

¹⁰⁷² K. Lenaerts, "The interplay between Regulation No. 1049/2001 on Access to Documents and the specific EU Regulations in the field of competition law" in D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae Civic – Liber Amicorum Jacques Steenberghe*, Gent, Larcier, 2014, 490.

¹⁰⁷³ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004. The regulation states that when complainants participate in the proceedings, they shall only be given a copy of the non-confidential version of the statement of objections (Article 6). Furthermore, when the Commission intends to reject a complaint, the complainant may request access to the relevant documents, but may not have access to business secrets and other confidential information belong to other parties in the proceedings (Article 8). Oral hearings are not public, and persons may be heard separately or in the presence of other persons invited to attend, having regard to "the legitimate interest of the undertakings in the protection of their business secrets and other confidential information" (Article 14 (6)). Also with regard to the recordings of the oral hearing, regard shall be made to these legitimate interests (Article 14 (8)). When access to the file is granted after the notification of the Statement of Objections, this access does not extend to business secrets or other confidential information or internal documents of the Commission or of the competition authorities of the member states (Article 15 (2)). Article 16 of the Regulation is dedicated entirely to the identification and protection of confidential information and states that information containing business secrets or confidential information will not be communicated or made accessible by the Commission. Furthermore, the opportunity is given to people expressing their views on the Statement of Objections or a rejection of the complaint, and to people submitting further information, to identify material which they consider to be confidential and to provide a non-confidential version. The Commission may also "require undertakings and associations of undertakings which produce documents or statements pursuant to Regulation (EC) No 1/2003 to identify the documents or parts of documents which they consider to contain business secrets or other confidential information belonging to them and to identify the undertakings with regard to which such documents are to be considered confidential. The Commission may likewise require undertakings or associations of undertakings to identify any part of a statement of objections, a case summary drawn up pursuant to Article 27(4) of Regulation (EC) No 1/2003 or a decision adopted by the Commission which in their view contains business secrets." If undertakings or associations do not comply with these rules, the Commission may assume that there is not confidential information contained in the documents or statements (Article 16). For this reason, the Commission issued an informal guidance paper for companies that are recipients of requests for information on how to make confidentiality claims for information contained in their submissions. DG Competition informal guidance paper on confidentiality claims, March 2012, available at http://ec.europa.eu/competition/antitrust/guidance_en.pdf (accessed May 2017).

¹⁰⁷⁴ Article 6 Regulation 773/2004.

complaint, the complainant may request access to the relevant documents, but may not have access to business secrets and other confidential information belonging to other parties in the proceedings.¹⁰⁷⁵ Oral hearings are not public, and persons may be heard separately or in the presence of other persons invited to attend, having regard to the legitimate interest of the undertakings in having their confidential information protected.¹⁰⁷⁶ With regard to the recordings of the oral hearing, regard shall be made to these legitimate interests.¹⁰⁷⁷ When access to the file is granted after the notification of the statement of objections, this access does not extend to business secrets or other confidential information or internal documents of the Commission or of the competition authorities of the Member States.¹⁰⁷⁸ Article 16 of the Regulation is dedicated entirely to the identification and protection of confidential information. For this reason, the Commission issued an informal guidance paper for companies that are recipients of requests for information on how to make confidentiality claims for information contained in their submissions.¹⁰⁷⁹ The Regulation was furthermore amended to be in line with the Damages Directive (see below, Part II, 3.5.1.3).¹⁰⁸⁰

The Staff Regulations of Officials of the European Union as well prescribe that officials should refrain from the unauthorised disclosure of information that they received in the line of duty, unless it had already been made public or is accessible to the public. This obligation remains valid after the official has left the service.¹⁰⁸¹ No further clarifications are provided. The provisions of the Rules of Procedure of the Court of Justice regarding access to the file of the case deserve to be mentioned as well.¹⁰⁸² Third parties to a procedure may not have access to the file unless the President of the General Court decides otherwise after hearing the former.¹⁰⁸³ A request in writing should seek to establish that the applicant has a legitimate interest in obtaining information in the file. The concerned parties have the opportunity get their views across. The General Court may decide to omit the names of parties or third parties as well as specific information from the publicly available case, where there are legitimate reasons to keep them confidential.¹⁰⁸⁴ Finally, the general Notice on access to the Commission's file makes repetitive mention of the protection of business secrets and other confidential information,¹⁰⁸⁵ as does the Regulation on protection of personal data.¹⁰⁸⁶ The

¹⁰⁷⁵ Article 8 Regulation 773/2004.

¹⁰⁷⁶ Article 14(6) Regulation 773/2004.

¹⁰⁷⁷ Article 14(8) Regulation 773/2004.

¹⁰⁷⁸ Article 15(2) Regulation 773/2004.

¹⁰⁷⁹ DG Competition informal guidance paper on confidentiality claims, March 2012, available at http://ec.europa.eu/competition/antitrust/guidance_en.pdf (accessed May 2017).

¹⁰⁸⁰ Commission Regulation 2015/1348 of 3 August 2015 amending Regulation (EC) No 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, *OJ L* 208, 5.8.2015.

¹⁰⁸¹ Article 17 Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission, *OJ L* 56, 4.3.1968, as amended by Council Regulation (EC, EURATOM) No 723/2004 of 22 March 2004 amending the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities, *OJ L* 124, 27.4.2004.

¹⁰⁸² Rules of procedure of the General Court, *OJ L* 105, 23.4.2015. (New Rules of Procedure, NRP)

¹⁰⁸³ Article 38(2) NRP.

¹⁰⁸⁴ Article 66 NRP. Also see K. Andova, M. Barennes, V. Terrien, "New rules of procedure of the EU General Court: what are the new provisions that may specifically matter to competition lawyers?", *Concurrences*, N°3-2015 (in *Concurrences*, Competition Law Review, English Edition 2016), 89.

¹⁰⁸⁵ Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, *OJ C* 325, 22.12.2005.

¹⁰⁸⁶ See for instance Article 45 on professional secrecy. Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, *OJ L* 8/1, 12.1.2001.

guarantees offered by the Transparency Regulation and Damages Directive will be discussed in the section dealing with discovery in private litigation (see below, Part II, 3.5.1.3).¹⁰⁸⁷

A quick excursion to US confidentiality rules is useful. Before the entry into force of the IAEAA, the US was, like many other nations, severely constrained to share confidential information such as business secrets, grand jury material, or amnesty information. The AMC confirmed that without an AMAA the US is generally prevented from sharing confidential information obtained from undertakings in the course of antitrust investigations.¹⁰⁸⁸ The protection offered to this information is spread across various sources such as statutes, court orders, procedural rules, or the DoJ Antitrust Division's policies.¹⁰⁸⁹ Confidentiality and privacy is governed by several different laws and rules at the federal level, making a distinction inter alia between information received from individuals, companies, or other governmental bodies. As in the EU, both the disclosure of such information as its use is restricted.

More precisely, the US antitrust agencies (DoJ and FTC) are legally obliged to treat as confidential all information obtained pursuant to the Hart-Scott-Rodino Act, revolving around mandatory premerger notification and review. The FTC cannot publicly disclose information obtained pursuant to compulsory process under the Federal Trade Commission Act, while the DoJ is under the same obligation for information obtained through civil compulsory process pursuant to the Antitrust Civil Process Act. Very limited exceptions apply. In DoJ criminal antitrust cases, the Federal Rules of Criminal Procedure prohibit members of the grand jury, government attorneys and their authorized assistants, and other grand jury personnel from disclosing matters occurring before the grand jury, again subject to limited exceptions. Moreover, in both criminal and civil procedures, some information is subject to confidentiality due to its content, such as information regarding privacy, national security information, and trade secrets.¹⁰⁹⁰ The files of a competition authority are therefore often protected from discovery.¹⁰⁹¹

Confidential treatment implies that information may only be disclosed in discrete circumstances and for specific uses. Confidential information produced by parties and third parties may for instance be used by all agencies in court proceedings. However, if the agencies file civil or criminal cases in federal court or issue a complaint in an administrative proceeding before an administrative law judge and seek to introduce evidence for use in court proceedings, a protective order may be granted on request of the parties or source of the confidential information to prevent such information from being disclosed beyond the court proceeding. Another option is to file the information under seal, or according to a similar process in administrative proceedings, to exclude it from the public record.¹⁰⁹²

¹⁰⁸⁷ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *OJ L* 145, 31.5.2001.

¹⁰⁸⁸ D. Garza, J. Yarowsky, B. Burchfield, W. S. Cannon, D. Carlton, M. Delrahim, J. Jacobson, D. Kempf, Jr., S. Litvack, J. Shenefield, D. Valentine, J. Warden, *Antitrust Modernization Commission - Report and Recommendations*, April 2007, available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (accessed May 2015), 218.

¹⁰⁸⁹ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 26.

¹⁰⁹⁰ OECD, Discussion on how to define confidential information, Contribution of the United States, DAF/COMP/WP3/WD(2013)55, 29 October 2013, 2-3.

¹⁰⁹¹ Global competition review, know-how, topics, private litigation, <http://globalcompetitionreview.com/> (accessed January 2015).

¹⁰⁹² OECD, Discussion on how to define confidential information, Contribution of the United States, DAF/COMP/WP3/WD(2013)55, 29 October 2013, 3.

As in the EU, the right of access, in this case to federal agency records, is the rule, while confidential treatment is the exception. This right is granted via the Freedom of Information Act. Exceptions to this right relevant to FTC or DoJ investigations include “(i) *information withheld on the basis of other statutory confidentiality protections, including [Hart Scott Rodino] and Civil Investigative Demand materials; (ii) trade secrets and commercial or financial information identified as privileged or confidential; (iii) information compiled for law enforcement purposes to the extent that its disclosure could interfere with the proceedings, disclose a confidential source, or constitute an unwarranted invasion of personal privacy; (iv) intra-agency and inter-agency memoranda or letters that would be routinely privileged in civil discovery, e.g., attorney work-product or attorney-client information; and (v) national defense or foreign policy information that is properly classified.*”¹⁰⁹³ Finally, information may also be protected via agency policies, for instance in the case of leniency information. The DoJ does not publicly disclose a leniency applicant’s identity or information provided by such an applicant, absent prior disclosure by or agreement with the applicant, unless required to do so by court order in connection with litigation.¹⁰⁹⁴ Confidentiality legislation is therefore spread throughout a whole series of acts and policy.¹⁰⁹⁵ This makes it a rather opaque system.

3.2.1.2 Why Switzerland?

The absence of a first generation cooperation agreement between the EU and Switzerland could make one to question why Switzerland was the first country to conclude a second generation agreement with the EU. The relationship between the EU and Switzerland is a complex, *albeit* intense one, with more than a hundred bilateral agreements concluded between both parties.¹⁰⁹⁶ While an agreement entirely dedicated to competition law was lacking, other agreements did contain competition provisions, but confined to certain sectors.¹⁰⁹⁷ In a contribution to the 2012 OECD Global Forum on Competition, Swiss officials mentioned four cartel decisions of COMCO where DG COMP had also opened investigations as examples of situations where enhanced cooperation would have resulted in a more efficient identification and elimination of the cartels concerned. The following paragraph from COMCO’s 2010 annual report indicated that the relationship between both agencies was indeed amenable for improvement: “One may ask why the Swiss proceeding is taking so

¹⁰⁹³ Ibid.

¹⁰⁹⁴ Ibid.

¹⁰⁹⁵ 15 USC §§ 6201-6212, International Antitrust Enforcement Assistance Act; 15 USC §§ 1311-1314, Antitrust Civil Process Act (applies only to DOJ) ; 15 USC §§ 41-68, the Federal Trade Commission Act (applies only to FTC); 16 C.F.R. § 3.1, et seq., FTC Rules of Practice for Adjudicative Proceedings (applies only to FTC); Rule 26 (c) of the Federal Rules of Civil Procedure; Rule 6 of the Federal Rules of Criminal Procedure ; 5 USC § 552, Freedom of Information Act; 28 C.F.R. § 16.7, procedure for processing requests for disclosure of information subject to the business information exemption to FOIA (applies only to DOJ); 5 USC § 552a, Privacy Act.

¹⁰⁹⁶ European Union External Action, Switzerland, http://eeas.europa.eu/switzerland/index_en.htm (accessed June 2012); Proposal for a Council Decision on the signing of an Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, COM/2012/0244 final - 2012/0126 (NLE), Explanatory Memorandum, June 2012, paragraph 3.

¹⁰⁹⁷ The Aviation Agreement of 21 June 1999 contains cooperation provisions, restricted however to aviation matters and in the context of Switzerland adopting the *EU acquis* regarding international air traffic. The nature of the agreement is therefore different from typical cooperation agreements. (P. Kobel & D. Viros, “Cooperation Agreement – Investigations – Confidentiality obligations: The European Union and Switzerland reach the agreement concerning the application of their competition law entering in force on 1st December 2014”, *Concurrences*, N° 2- 2015, 211.) The Free Trade Agreement of 1972 contains general cooperation obligations. (Agreement between the European Economic Community and the Swiss Confederation, Agreed by Council Regulation (EEC) NO 2840/72 of 19 December 1972, Articles 23, 27; F. Hoffet, M. Dietrich & G. Brei, “Cooperation Agreement Switzerland – EU on Competition Law becomes effective on 1 December 2014, Facilitation of the Transmission of Confidential Information and Documents between Swiss and European Competition Authorities”, *Homburger Bulletin*, 6 November 2014, http://www.homburger.ch/fileadmin/publications/Homburger_Bulletin_20141106_EN.PDF, 1.

*long and why it could not be wrapped up at more or less the same time as the European Commission's investigation. The reason lies essentially in the impossibility of co-operating with that institution [...]. Moreover, when a parallel proceeding is conducted by the European Commission, the Swiss competition authorities, in the absence of formal co-operation, have no way of knowing before that investigation is completed what deeds the EU is going to prosecute and punish [...].”*¹⁰⁹⁸ Regardless of political will to cooperate, the absence of a formal legal basis rendered deeper cooperation impossible.

The European Parliament stressed Switzerland's strategic geographic location for the EU, the presence of many EU companies in Switzerland and vice versa, and the number of parallel investigations conducted by both jurisdictions in the recent past to demonstrate the need for a second generation agreement.¹⁰⁹⁹ At the time of conclusion, Switzerland was the third-largest economic partner of the EU and the second largest FDI recipient.¹¹⁰⁰ More important, however, than the fact that the Swiss and European economies are deeply integrated, is that their competition regimes are largely similar in terms of both substance and procedure.¹¹⁰¹ While reciprocity is not an explicit condition for the conclusion of a second generation agreement with the EU, both the Explanatory Memorandum as well as the preamble of the EU-Switzerland Agreement strongly underline the similarities between Swiss and EU substantive and procedural rules.¹¹⁰² This might indicate that de facto reciprocity is a requirement to enter into a second generation agreement. It represents a reassurance for the EU Member States and the Swiss government that their interests will earn equal protection in the partner country. In the US-Australia Agreement a reciprocity requirement is explicitly made. The IAEAA clarifies that this reciprocity requirement requires that the assistance provided by the foreign antitrust authority should be comparable in scope to that which the national authorities provide and that the confidentiality laws of the foreign state should provide no less protection than the domestic laws.¹¹⁰³

The EU-Switzerland second generation Agreement was rather optimistically labelled “*a milestone on the path towards convergence and cooperation in the field of antitrust enforcement.*”¹¹⁰⁴ The Agreement was to a large extent modelled after the aforementioned 1995 OECD Recommendation on international cooperation in the field of competition law as well as some provisions of both Swiss and EU agreements with Japan.¹¹⁰⁵ Both parties engaged in preliminary exploratory talks in 2006/2007, the

¹⁰⁹⁸ OECD, Global Forum on Competition Improving international co-operation in cartel investigations, Contribution from Switzerland, DAF/COMP/GF/WD(2012)15, 7 February 2012, 4.

¹⁰⁹⁹ European Parliament Resolution on EU Cooperation Agreements on Competition Policy Enforcement – The Way Forward, 2013/2921(RSP), 5 February 2014, paragraph 2.

¹¹⁰⁰ Opinion of the Committee on International Trade for the Committee on Economic and Monetary Affairs on the proposal for a Council decision on the conclusion of an Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, 12418/2012 – C7-0146/2013 – 2012/0127(NLE), 17 December 2013.

¹¹⁰¹ Steptoe & Johnson LLP, “EU and Switzerland sign antitrust cooperation agreement of unprecedented depth”, *Lexology*, 29 May 2013.

¹¹⁰² Proposal for a Council Decision on the signing of an Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, COM/2012/0244 final - 2012/0126 (NLE), Explanatory Memorandum, June 2012, paragraph 4, 5, 10.

¹¹⁰³ 15 USC, section 6211(2).

¹¹⁰⁴ B. A. Nigro Jr., T. Caspary & T. Vere-Hodge, “Antitrust cooperation agreement would permit EU and Swiss competition authorities to share evidence and confidential documents without the consent of the investigated party”, *Lexology*, 17 May 2013.

¹¹⁰⁵ Message relatif à l'approbation de l'accord entre la Suisse et l'Union européenne concernant la coopération en matière d'application de leurs droits de la concurrence, 13.044, 22 mai 2013.

Agreement was signed on 17 May 2013, and eventually entered into force on 1 December 2014.¹¹⁰⁶ A large part of the discussions during the negotiation process revolved around the practical aspects of information exchange whereby speed and effectiveness for the authorities would be central, without however neglecting the confidentiality regulations and other procedural guarantees contained in the national legislation of the parties.¹¹⁰⁷ While overall the adoption process was smooth, the approval of the Agreement was delayed for a while due to concerns of a Swiss parliamentary committee that had postponed a debate on the text as it considered allowing companies to appeal against data-sharing decisions, in the context of a simultaneous reform of Swiss competition law.¹¹⁰⁸ This provision was eventually removed from Swiss law and replaced by prior notice to the companies involved when information about them will be transferred (see below, Part II, 3.2.4).¹¹⁰⁹

Whereas in the 1991 EU-US Agreement the purpose of the agreement was described as the promotion of cooperation and coordination and the lessening of the possibility or impact of differences in the application of the competition laws of the parties,¹¹¹⁰ a broader perspective is employed in the EU-Switzerland Agreement, seeing cooperation and coordination not as the goal, but as a means to achieve effective enforcement.¹¹¹¹ The EU-Switzerland Agreement aims to not only lessen the possibility of conflicts, but also to avoid it. Sound and effective competition law enforcement is presented in function of the operation of the respective markets of the parties, trade between the parties, and finally the economic welfare of the consumers. This last element is new compared to the 1991 EU-US Agreement. The explicit mention in the preamble of consumer welfare strengthens its value within competition policy. It is remarkable that the Explanatory Memorandum accompanying the Agreement mentions that via the Agreement the Commission can benefit from the results of information gathered by the Swiss Competition Commission, but does not explicitly state the reverse benefit for the Swiss authorities.¹¹¹² And yet, in the ‘Federal Gazette’ or ‘Bundesblatt’, it is made clear that such benefits certainly exist for Switzerland. According to DUCREY, involved in the negotiations of the Agreement, this is simply an omission and does not point to an imbalance in the obligations flowing from the Agreement.¹¹¹³ In the Gazette it is underlined that Switzerland has a particular interest in competition law enforcement cooperation, as it does not enjoy the benefits that other EU member states enjoy in this regard. The Agreement, according to the Swiss, will result in better protection of competition in both Switzerland as the EU, and is in the best interest of both parties. It is emphasised that due to the materially very similar competition legislation in both jurisdictions, it is very likely that the authorities will investigate identical behaviour and therefore possess useful information for each other. Finally, it is explicitly stated that the COMCO’s functioning will be improved because the agreement will allow it to use

¹¹⁰⁶ Ratification was delayed due to reasons not related to the Agreement itself, namely tensions between Switzerland and the EU revolving around a referendum held in Switzerland on an immigration ban. European Parliament, Directorate-General for Internal Policies, Policy Department A – Economic and Scientific Policy, Competition Policy in International Agreements – Study for Econ Committee, IP/A/ECON/2015-02, August 2015, 21.

¹¹⁰⁷ Message relatif à l’approbation de l’accord entre la Suisse et l’Union européenne concernant la coopération en matière d’application de leurs droits de la concurrence, 13.044, 22 mai 2013.

¹¹⁰⁸ L. Crofts, “EU, Swiss antitrust accord hits snag as data-sharing comes under review”, *Mlex*, 2 December 2013.

¹¹⁰⁹ M. Newman, “Swiss parliament aims to approve EU, Swiss data-sharing accord in June”, *Mlex*, 22 May 2014.

¹¹¹⁰ Article I 1991 EU-US Agreement.

¹¹¹¹ Article 1 EU-Switzerland Agreement.

¹¹¹² Proposal for a Council Decision on the signing of an Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, COM/2012/0244 final - 2012/0126 (NLE), Explanatory Memorandum, June 2012, paragraph 4.

¹¹¹³ Telephone interview with Patrik Ducrey, member of the Swiss negotiating team for the EU-Switzerland second generation Agreement, 24 February 2017.

evidence provided by the European Commission, thereby minimising the ‘disadvantage’ the COMCO encounters by not being part of the ECN.¹¹¹⁴

3.2.1.3 Legal basis

A legal basis to exchange confidential information among competition authorities can manifest itself in two ways. First, national enabling legislation may offer the legal basis for cooperation between authorities of different jurisdictions by either allowing for direct information exchange – so-called ‘information gateways’ (see below, Part II, 4.1.2) – or by allowing competition authorities to enter into second generation agreements. Second, the legal basis can be directly provided via the conclusion of cooperation agreements, as is the case in the EU.

The US preceded the EU in providing a legal basis to exchange confidential information by doing so already in November 1994. Under impetus of the CLINTON administration and with widespread bipartisan support, the US Congress enacted the aforementioned International Antitrust Enforcement Assistance Act. This act allowed the US to conclude so-called antitrust mutual assistance agreements (AMAAs), which permit the US to provide assistance to foreign authorities in both civil and criminal cases, and determine under which conditions such assistance can take place.¹¹¹⁵ At the time of enactment of the IAEAA, the necessity of the act was strongly underlined, in particular because several jurisdictions such as Japan, the EU, and the UK, voiced their concerns regarding the Act.¹¹¹⁶ BINGAMAN, Assistant Attorney General at the time, stated that *“this legislation is vitally needed if we are to bring our antitrust enforcement tools into line with the realities of the global economy of today and tomorrow.”*¹¹¹⁷ It was announced as ‘a critical contribution’ to international competition law enforcement.¹¹¹⁸ The term regional economic integration organization was moreover specifically included in the definition of an AMAA to make the conclusion of an agreement with the EU possible.¹¹¹⁹

According to ZANETTIN, the AMAAs that can be concluded under the IAEAA are executive agreements under US law. This would imply that they are subordinate to federal legislation.¹¹²⁰ ZANETTIN therefore disagrees with PAPADOPOULOS, who claims that an AMAA, like a normal mutual legal assistance agreement, is not an executive agreement of a voluntary nature, but a binding

¹¹¹⁴ Message relatif à l’approbation de l’accord entre la Suisse et l’Union européenne concernant la coopération en matière d’application de leurs droits de la concurrence, 13.044, 22 mai 2013.

¹¹¹⁵ M. Taylor, *International Competition Law: a new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 115. Also see OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Background Note, DAF/COMP/GF(2012)6, 13 February 2012, 21-22.

¹¹¹⁶ P. White, “International judicial assistance in antitrust enforcement: the shortcomings of current practices and legislation, and the roles of international organizations”, *Administrative Law Review*, Vol. 62, No. 1, 2010, 273.

¹¹¹⁷ Statement of Anne K. Bingaman, Assistant Attorney General, Antitrust Division, before the Committee on the Judiciary U.S. Senate concerning the International Antitrust Enforcement Assistance Act of 1994, S. 2297, 4 August 1994.

¹¹¹⁸ FTC Press Release, “First International Antitrust Assistance Agreement Under New Law Announced by FTC and DOJ”, P829612, 17 April 1997.

¹¹¹⁹ 15 USC section 6211(9): “The term “regional economic integration organization” means an organization that is constituted by, and composed of, foreign states, and on which such foreign states have conferred sovereign authority to make decisions that are binding on such foreign states, and that are directly applicable to and binding on persons within such foreign states, including the decisions with respect to (A) administering or enforcing the foreign antitrust laws of such organization, and (B) prohibiting and regulating disclosure of information that is obtained by such organization in the course of administering or enforcing such laws.”

¹¹²⁰ B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 158.

treaty.¹¹²¹ While neither author provides clear arguments on why they qualify the agreement as such, one is inclined to agree with ZANETTIN, as it is not the AMAA itself that alters federal laws, but the IAEAA that introduced several amendments to the federal legislation, which allows the cooperation under AMAAs to go further than the first generation agreements. The American Bar Association Section of Antitrust Law adheres to this view and qualifies the agreement as a bilateral, inter-agency agreement, and not an official US treaty.¹¹²²

Almost twenty years after the introduction of the IAEAA, the US only entered into one mutual antitrust enforcement agreement.¹¹²³ The agreement with Australia remains the first and only agreement concluded under the IAEAA. The US and Australia were parties to an earlier competition agreement of 1982. The relationship between the two countries and their competition agencies allegedly markedly improved following the 1982 Australia-US Agreement. The enactment of the IAEAA was then a good opportunity for both parties to deepen and strengthen their relationship.¹¹²⁴ Not every competition authority is eligible to sign an AMAA with the US authorities. For the US, Australia represented a suitable partner because the latter had similar legislation as the IAEAA in place, thereby fulfilling the reciprocity requirement.¹¹²⁵

It was already established that Article 339 TFEU does not lead to an absolute prohibition for the Commission to transmit information covered by professional secrecy. In an intra-EU context the legal basis is provided via the duty of loyal cooperation in Article 4(3) TEU. This principle requires the Commission to provide EU national courts with whatever information the latter may seek, including information covered by the obligation of professional secrecy.¹¹²⁶ The legal basis for information exchange with the competition agencies of third countries takes the form of an international agreement. Contrary to the US, where enabling legislation in the form of the IAEAA provided the legal basis, in the EU the Agreement with Switzerland itself forms the legal basis for the exchange of confidential information. The 1991 EU-US Agreement states that nothing in the agreement can be interpreted in a manner inconsistent with the existing laws, or as requiring any change in the laws of either parties.¹¹²⁷ This is nuanced in the EU-Switzerland Agreement, where it is stipulated that nothing in the Agreement “*shall be construed to prejudice the formulation or enforcement of the competition laws of either Party.*”¹¹²⁸ It was confirmed by an official involved in the negotiation of the Agreement that the emphasis on competition laws ensures that other laws, for example touching on

¹¹²¹ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 85.

¹¹²² C. Laciak, *International Antitrust Cooperation Handbook*, Chicago Ill., ABA Section of Antitrust Law, 2004, 47.

¹¹²³ The 1992 Mutual Assistance in Business Regulation Act. P. Holmes, H. Müller, A. Papadopoulos, & A. Sydorak, “A Taxonomy of International Competition Cooperation Provisions”, paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 56.

¹¹²⁴ B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 157-158.

¹¹²⁵ FTC, Press Release, “First International Antitrust Assistance Agreement under New Law Announced by FTC and DOJ Agreement between U.S. and Australia Allows for Countries to Share Information and Provide Investigative Assistance”, 17 April 1997. Also see <https://www.justice.gov/atr/annex-1-c> (accessed June 2017).

¹¹²⁶ See http://ec.europa.eu/competition/court/state_aid_requests.html (accessed June 2017). More generally, see Article 15(1) of Regulation 1/2003 allowing national courts to ask the Commission for information in its possession. This may include information of a procedural nature, such as whether the Commission has opened a case or whether case is pending, or whether it has taken a position. It may also encompass an estimation of the time required before a decision will be made, or factual information such as statistics, market studies or economic analyses. Also see Commission Notice on cooperation between the Commission and the Courts of the Member States, *OJ C* 101, 27.04.2004, points 21-26b.

¹¹²⁷ Article IX 1991 EU-US Agreement.

¹¹²⁸ Article 13 EU-Switzerland Agreement.

the area of confidentiality, can therefore be overridden and that the legal basis for confidential information exchange can be found in this provision.¹¹²⁹ A downside of using agreements as a direct legal basis is that each time an agreement is concluded, approval of the legislature is needed. This approval is time- and resource-consuming, and may be influenced by the political agenda.¹¹³⁰ National enabling legislation would in principle require legislative approval only once, which would offer more flexibility. The EU chose not to adopt enabling legislation similar to the US' IAEAA as this would imply a delegation of power and autonomy to the Commission, which the Council did not want to give (see below, Part II, 4.1.4).¹¹³¹ The proposal for a Council Decision referred to the first subparagraphs of Article 207(3) and (4), and Article 218(7) TFEU,¹¹³² but the Council Decisions on the signing and the conclusion of the EU-Switzerland cooperation agreement both refer to Articles 103 and 352 TFEU (the 'catch-all' legal basis for Union action), in conjunction with respectively Article 218(5) TFEU and Article 218(6)(a)(v) TFEU, requiring consent of the European Parliament.¹¹³³ The legal basis and procedure of conclusion are therefore the same as for the EU's first generation agreements.

3.2.2 Scope of the EU-Switzerland Agreement

The scope of the EU-Switzerland Agreement in terms of the anti-competitive behaviour covered includes horizontal and vertical anticompetitive agreements, abuse of dominant position, and concentrations.¹¹³⁴ State Aid, a field unknown as such under Swiss law, is not included.¹¹³⁵ It should be noted that the notification of decisions to undertakings in the territory of the other party is not regulated by the Cooperation Agreement. This is subject to a separate Exchange of Diplomatic Notes between the EU and Switzerland.¹¹³⁶ The reason for this exclusion is that in the EU this

¹¹²⁹ Interview with Commission official.

¹¹³⁰ L. Laudati, *Study of exchange of confidential information agreements and treaties between the US and Member States of the EU in areas of securities, criminal, tax and customs*, Luxembourg, Office for Official Publications of the European Communities, 1996, 5.

¹¹³¹ B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 170. Interview with Commission official.

¹¹³² Proposal for a Council Decision on the conclusion of an Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, COM/2012/0245 final - 2012/0127 (NLE), 1 June 2012.

¹¹³³ Council Decision of 21 October 2014 on the conclusion of an Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws (2014/866/EU), *OJ L* 347, 3.12.2014; Council Decision of 22 April 2013 on the signing, on behalf of the European Union, of an Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws (2013/203/EU), *OJ L* 117, 27.4.2013.

¹¹³⁴ Respectively Articles 101 TFEU, 102 TFEU, 105 TFEU and Council Regulation EC 139/2004 where the EU is concerned. The relevant provisions of the agreement on the EEA are also covered (Articles 53 and 54 EEA agreement io. Articles 101 and 102 TFEU). With regard to Switzerland, the Agreement covers the Federal Act on Cartels and other Restraints of Competition (CartA) of 6 October 1995, its implementing regulations and amendments. Article II EU-Switzerland Agreement.

¹¹³⁵ P. Kobel & D. Viros, "Cooperation Agreement – Investigations – Confidentiality obligations: The European Union and Switzerland reach the agreement concerning the application of their competition law entering in force on 1st December 2014", *Concurrences*, N° 2- 2015, 211.

¹¹³⁶ These notes provide that EU Commission decisions regarding Art. 101, 102 and 105 TFEU or Art. 53 and 54 of the EEA Agreement will be notified by the COMCO to undertakings in Switzerland which have no notification address in the EU (See the Note drafted by the Federal Department of Economic Affairs, available at https://www.wbf.admin.ch/fileadmin/customer/wbf_internat/20140923_EN_Flyer_GSWBFKomm_WEB_Intern_No te-Competition-rules_0001.pdf, accessed April 2017). The EU Commission on its side recognised the need to find an efficient way of notifying the decisions rendered by the COMCO regarding undertakings in the EU. The difficulty lay in

belongs to the competence of the Member States. Its inclusion would cause the Agreement to become a mixed agreement, which would significantly complicate the negotiation process.¹¹³⁷

The EU-Switzerland Agreement does not contain a definition of confidential information, but rather refers to ‘information obtained by investigative process.’¹¹³⁸ The Agreement clarifies that ‘information obtained by investigative process’ means any information obtained by a Party using its formal investigative rights or submitted to a Party pursuant to a legal obligation.¹¹³⁹ Such information includes for instance information obtained during dawn raids, responses to information requests or oral statements.¹¹⁴⁰ In the US, a similar definition is used, for what is called ‘antitrust evidence’. Antitrust evidence in the US-Australia Agreement includes “*information, testimony, statements, documents or copies thereof, or other things that are obtained, in anticipation of, or during the course of, an investigation or proceeding under the Parties’ respective antitrust laws, or pursuant to the Parties’ respective antitrust laws, or pursuant to the Parties’ Mutual Assistance Legislation.*”¹¹⁴¹ Information obtained under the pre-merger notification procedure is excluded in the US-Australia Agreement, in contrast with the EU-Switzerland Agreement, where information concerning concentrations does fall under the scope of the agreement.¹¹⁴² This exclusion seems strange, because cooperation occurs frequently in the merger sector, and confidentiality waivers are exchanged on a regular basis by the parties. This good practice could have been generalised in the Agreement. However, even in intra-US information exchange

the fact that Member States remained sovereign in matters of administrative assistance. (P. Kobel & D. Viros, “Cooperation Agreement – Investigations – Confidentiality obligations: The European Union and Switzerland reach the agreement concerning the application of their competition law entering in force on 1st December 2014”, *Concurrences*, N° 2- 2015, 212.)

¹¹³⁷ Message relatif à l’approbation de l’accord entre la Suisse et l’Union européenne concernant la coopération en matière d’application de leurs droits de la concurrence, 13.044, 22 mai 2013.

¹¹³⁸ Article 7 EU-Switzerland Agreement. Reference is made to Articles 18 to 22 of Council Regulation 1/2003, as well as information acquired through the application of Council Regulation 139/2004. This concerns information gathered via Commission requests for information, through statements taken by the Commission, and by means of inspections of business or other premises by or on behalf of the Commission. For Switzerland reference is made to Articles 40 and 42(1)(2) of the Cartel Act (CartA), and information acquired through the application of the Ordinance on the Control of Concentrations of Undertakings. The reference to the Cartel Act implies that the exchange of information is authorized even during a preliminary investigation, before a formal investigation has been opened (Article 26-27 CartA). At this stage of the procedure, the parties do not have access to the file and cannot assess the type of information that could be transmitted. (D. Mamane, “Competition law cooperation agreement EU/Switzerland”, *Kluwer Competition Law Blog*, 31 July 2012.)

¹¹³⁹ “(a) For the Union, this means information obtained through requests for information according to Article 18 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (1) (hereinafter referred to as ‘Regulation (EC) No 1/2003’), oral statements according to Article 19 of Regulation (EC) No 1/2003 and inspections conducted by the European Commission or on behalf of the European Commission according to Articles 20, 21 or 22 of Regulation (EC) No 1/2003 or information acquired as a result of the application of Regulation (EC) No 139/2004.

(b) For Switzerland, this means information obtained through requests for information according to Article 40 Acart, oral statements according to paragraph 1 of Article 42 Acart and inspections conducted by the competition authority according to paragraph 2 of Article 42 Acart, or information acquired as a result of the application of the Ordinance on the Control of Concentrations of Undertakings of 17 June 1996.” Article 2(6) EU-Switzerland Agreement.

¹¹⁴⁰ S. Hammond, D. Wood, M. Healy, “New Swiss/EU Cooperation Agreement creates enhanced enforcement opportunities for antitrust regulators, but leaves uncertainty for companies”, *Gibson Dunn Publications*, 10 December 2014.

¹¹⁴¹ Article I US-Australia Agreement.

¹¹⁴² This provision has been inserted after concern of the business community about their international competitive positions. According to ZANETTIN “[this] provision is particularly regrettable. It is true that Hart-Scott-Rodino information is very sensitive, but the LAEAA provides strict confidentiality requirements, and the US authorities are specifically empowered, under the ‘public interest’ provision, not to disclose very sensitive information in specific cases. ... The second main criticism is that it seriously constrains the scope of cooperation under the LAEAA and the usefulness of this act. The study of soft cooperation revealed that it is in the area of international mergers that such cooperation mainly takes place.” (Zanettin, *Cooperation between antitrust agencies at the International Level*, 2002, 162-163.)

among the Antitrust Division and FTC and the States, merger information can only be exchanged in presence of a waiver.¹¹⁴³

Other categories of information are similarly excluded from being exchanged under an AMAA according to the IAEAA.¹¹⁴⁴ The seemingly broad mandate given by section 6201 of the IAEAA to cooperate internationally in competition matters is quite significantly restricted by section 6204 of that same Act, by limiting the type of ‘antitrust evidence’ to which Section 6201 applies. It concerns first antitrust evidence that is matter occurring before a grand jury. This type of information cannot be exchanged, except when ‘a particularized need’ can be demonstrated.¹¹⁴⁵ More precisely, when an AMAA is concluded, foreign agency officials enforcing foreign antitrust law are considered as state officials enforcing state law in relation to requests to obtain grand jury materials in a Federal antitrust investigation, and can therefore take advantage of the exception in Rule 6(e)(3)(C)(iv) Federal Rules of Criminal Procedure, which permits disclosure to state officials even at the investigative stage. However, the foreign agency must still demonstrate a particularized need, unlike state officials.¹¹⁴⁶ There does not appear to be an objective reason why there is a positive presumption of the existence of this need when a state official makes a request, but not when a foreign government official does so.¹¹⁴⁷ Second, antitrust evidence meriting secrecy in the interest of national defence or foreign policy, and finally, antitrust evidence that is classified under section 142 of the Atomic Energy Act of 1954 are not exchangeable with foreign antitrust authorities.¹¹⁴⁸

One of the main differences between the EU-Switzerland Agreement and the US-Australia Agreement concerns the range of permitted assistance. Under the EU-Switzerland Agreement it is only permitted to exchange information that is already in the possession of the requested competition authority. The Commission or the Swiss competition authority may therefore not launch a dawn raid, send a questionnaire or hold hearings on behalf of the other.¹¹⁴⁹ Only information that was collected within the framework and for purposes of domestic proceedings can be shared with a foreign authority. Why the European and Swiss authorities decided to introduce this limitation is unclear, within the ECN for example it is allowed for one competition agency to use its investigative power on behalf of another ECN member authority.¹¹⁵⁰ Fact-finding measures are governed by both the substantive and procedural laws of the Member State where they take place. The results may be exchanged according to Article 12 of the Regulation (see below, Part II, 3.2.4). The system has allegedly worked well, and was used most often in the context of cartel investigations with regard to inspections, witness interviews and requests for information. Some resource and language issues did

¹¹⁴³ OECD, Working Party No. 3 on Co-operation and enforcement, Relationship between public and private antitrust enforcement, Contribution of the United States, DAF/COMP/WP3/WD(2015)11, 15 June 2015, 2-8.

¹¹⁴⁴ 15 USC Section 6204.

¹¹⁴⁵ This means that it must be demonstrated that “(1) the material is needed to avoid a possible injustice in another proceeding, (2) the need for disclosure outweighs the need to continue to maintain secrecy, and (3) the request covers only the minimal information required.” M. Chowdhury, “From paper promises to concrete commitments: Dismantling the obstacles to transatlantic cooperation in cartel enforcement”, AAI Working Paper No. 11-09, November 28, 2011, 11-12.

¹¹⁴⁶ Ibid., 11-12.

¹¹⁴⁷ B. Zanettin, *Cooperation between antitrust agencies at the International Level*, Portland, Hart Publishing, 2002, 164; M. Chowdhury, “From Paper Promises to Concrete Commitments: Dismantling the Obstacles to Transatlantic Cooperation in Cartel Enforcement”, American Antitrust Institute Working Paper No. 11-09, 28 November 2011, 10-12.

¹¹⁴⁸ 15 USC Section 6204.

¹¹⁴⁹ P. Kobel & D. Viros, “Cooperation Agreement – Investigations – Confidentiality obligations: The European Union and Switzerland reach the agreement concerning the application of their competition law entering in force on 1st December 2014”, *Concurrences*, N° 2- 2015, 211.

¹¹⁵⁰ Article 22(1) Regulation 1/2003.

arise, however, as well as legal issues relating to the divergent national procedural frameworks relating to for instance the requirements to conduct an inspection or proceed with a request for information or regarding to varying powers to conduct IT searches, impeding the acquisition of evidence.¹¹⁵¹ It is regrettable that the EU-Switzerland Agreement does not allow international investigative assistance, as this limits potential economies and goes against the latest recommendations of the OECD.¹¹⁵² Perhaps a rapid and relatively informal procedure was preferred over broader and more intrusive forms of international assistance paired with greater procedural constraints. It cannot be excluded that pressure from the business community to limit certain forms of assistance played a role as well. According to a Commission official, this exclusion related to the fact that investigative rights are shared between the Commission and the Member States and therefore difficult to enforce, and because allegedly there was ‘no actual need’ to extend cooperation to this length.¹¹⁵³ According to DUCREY this policy choice was not an issue of conflict during the negotiations as both parties considered legal assistance as going too far. He confirmed that both parties did not see the need for ‘such far-reaching provisions’.¹¹⁵⁴

The EU decidedly did not follow the example of the US-Australia Agreement, where this limitation does not exist. In the US-Australia Agreement competition authorities are given the opportunity to assist each other and cooperate in providing, or obtaining, antitrust evidence that may contribute to the determination of whether a person has violated, or is about to violate, the respective antitrust laws of the parties, or in facilitating the administration or enforcement of such antitrust laws.¹¹⁵⁵ In order to do so, they may actively gather information solely on behalf of a foreign jurisdiction. The IAEEA indeed empowers US enforcement officials to offer two types of assistance, on the one hand the sharing of antitrust information that the antitrust authorities have on file, and on the other hand the use of investigative authority to obtain evidence from private parties. Article II E clarifies what is to be understood by ‘assistance’ in the context of the US-Australia Agreement: “*Assistance contemplated by this Agreement includes but is not limited to: 1. disclosing, providing, exchanging, or discussing antitrust evidence in the possession on an Antitrust Authority; 2. obtaining antitrust evidence at the request of an Antitrust Authority of the other party, including (a) taking the testimony or statements of persons or otherwise obtaining information from persons, (b) obtaining documents, records, or other forms of documentary evidence, (c) locating or identifying persons or things, and (d) executing searches and seizures, and disclosing, providing, exchanging, or discussing such evidence; and 3. providing copies of publicly available records, including documents or information in any form, in the possession of government departments and agencies of the national government of the Requested Party.*” The most controversial

¹¹⁵¹ Commission Staff Working Paper SEC(2009)574 accompanying the Communication from the Commission to the European Parliament and Council Report on the functioning of Regulation 1/2003 COM(2009)206 final, 29 April 2009, 72.

¹¹⁵² OECD, Recommendation of the OECD Council Concerning International Co-operation on Competition Investigations and Proceedings, C(2014)108, 16 September 2014.

¹¹⁵³ Interview with Commission official.

¹¹⁵⁴ Telephone interview with Patrik Ducrey, member of the Swiss negotiating team for the EU-Switzerland second generation Agreement, 24 February 2017.

¹¹⁵⁵ Article II US-Australia Agreement. The American Bar Association Section of Antitrust Law in its Report on the proposal of the agreement, expressed its concern on the inclusion of the word ‘administration’ apart from ‘enforcement’. It doubted the exact meaning of the word, and the compatibility with the IAEEA, which only mentions enforcement in its Section 6202(b)(2). (American Bar Association Section of Antitrust Law Report on the proposed agreement between the government of the United States of America and the government of Australia on mutual antitrust enforcement assistance). It is indeed unclear to what the administration of antitrust laws could point.

element in this list is the execution of searches and seizures, as the IAEAA does not mention search warrants clearly among the available discovery tools.¹¹⁵⁶

3.2.3 'Traditional' cooperation mechanisms

The main content of the EU-Switzerland Agreement can be divided into two categories. A first category consists of those provisions generally also present in the EU's first generation agreements, be it in a slightly adapted form. A second set of provisions regulates the exchange of information, including confidential information. This study focuses on the final category of provisions, as it constitutes the innovative element of the Agreement, but the traditional mechanisms will nevertheless be briefly addressed to indicate any evolution from the 1991 EU-US Agreement.¹¹⁵⁷

When a competition authority considers that certain enforcement activities that it engages in might affect important interests of the other party, Article III obliges it to notify that party. An enforcement activity in this context is any application of competition laws via investigation or proceedings conducted by the competition authority of a party.¹¹⁵⁸ This notification should happen in writing, but it is explicitly added that this may be done via electronic means, allowing notifications to happen fast and informally, for example through e-mail. Other forms of communication between both parties may also take place via e-mail. Contrary to Article X of the 1991 EU-US Agreement, a confirmation in writing through diplomatic channels – which can be slow and burdensome – is no longer required.¹¹⁵⁹ While the initial judgment on whether important interests of a party might be affected lies with the notifying party, a non-exhaustive list of such enforcement activities is provided in the Agreement. This list is very similar to the one contained in the 1991 EU-US Agreement,¹¹⁶⁰ with one new element: notification is also required for enforcement activities concerning anticompetitive activities (other than concentrations) against an undertaking incorporated or organised under the laws and regulations applicable in the territory of the other Party.

The appropriate timing for the notification is specified. The Commission should notify, in the case of concentrations, when initiating proceedings pursuant to Article 6(1)c of Council Regulation 139/2004, and in other cases when initiating a proceeding referred to in Article 2 of Commission Regulation 773/2004. Focus is put on notification in the very beginning of the enforcement process, which creates more possibilities for useful coordination and cooperation from the start. Notification should be allowed on a voluntary basis at an even earlier stage as well, for instance when information requests are sent out or if dawn raids are held. Parties are free to notify more activities than those mentioned in the Agreement if they are of the opinion that their enforcement actions could

¹¹⁵⁶ P. Holmes, H. Müller, A. Papadopoulos, & A. Sydorak, "A Taxonomy of International Competition Cooperation Provisions", paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 58; B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 160. For instance in 15 USC § 6202(d), 6203.

¹¹⁵⁷ See V. Demedts, "International competition law enforcement: different means, one goal?", *Competition Law Review*, Vol. 8, No.3, 2012, 223-253.

¹¹⁵⁸ Article 2 (5) EU-Switzerland Agreement.

¹¹⁵⁹ Furthermore, Article XII of the EU-Switzerland agreement states that unless otherwise agreed, communications should be made in English. This language preference does not appear in any of the EU's first generation agreements, but it eliminates possible costs of translation for the receiving party. In order to further facilitate communications, it is required that each competition authority installs a contact point.

¹¹⁶⁰ Article II 1991 EU-US Agreement.

potentially affect the interests of the other party.¹¹⁶¹ The 1991 EU-US Agreement contains far more detailed requirements for the timing of notifications, but does not specify the content of the notifications, in contrast to the EU-Switzerland Agreement.¹¹⁶² In the former Agreement it is merely stated that notifications should include ‘sufficient’ information to permit an initial evaluation by the recipient party of any effects on its interests,¹¹⁶³ while Article 3(5) of the EU-Switzerland Agreement specifies that notifications should include the names of the parties to the investigation, the activities under examination and the markets they relate to, the relevant legal provisions and the date of the enforcement activities. This corresponds with the information that is published in Switzerland when a merger investigation is opened.¹¹⁶⁴ The obligation is broadened beyond the merger context in the Agreement. This additional clarity is to be applauded as it guarantees that the notification contains all relevant information.

The competition authorities of both parties may coordinate their enforcement activities when they are pursuing related matters. ‘Related matters’ should be understood in a broad manner, allowing the authorities to cooperate as soon as they are faced with related facts, even at an early stage of the procedure.¹¹⁶⁵ The EU-Switzerland Agreement does not contain an explicit obligation to coordinate, but certain factors do need to be taken into account when considering whether or not to coordinate.¹¹⁶⁶ With some effort this could be read as an obligation to motivate any refusal. However, this does not seem to be the case. DUCREY clarified that neither party saw cooperation as an obligation, and that ‘neither party owes the other party an explanation.’ The issue allegedly was not a subject of discussion during the negotiations.¹¹⁶⁷ This is regrettable, as it thoroughly undermines the value and meaning of the Agreement. The parties would not give up any autonomy by committing to provide a justification for a refusal of assistance. Whereas the 1991 EU-US Agreement indicates the reduction of costs incurred by persons subject to enforcement activities as one factor to consider,¹¹⁶⁸ the EU-Switzerland Agreement more broadly mentions the avoidance of both conflicting obligations and unnecessary burdens for undertakings subject to the enforcement activities. Specific mention is made of the coordination of the timing of inspections. At the same time, however, coordination may be limited at any time subject to ‘appropriate notice’. Whereas the 1991 EU-US Agreement explicitly allowed complete termination of the coordination,¹¹⁶⁹ the EU-Switzerland Agreement only refers to ‘limitation’. The party limiting the coordination may proceed independently on a specific

¹¹⁶¹ Message relatif à l’approbation de l’accord entre la Suisse et l’Union européenne concernant la coopération en matière d’application de leurs droits de la concurrence, 13.044, 22 mai 2013.

¹¹⁶² In the case of mergers and acquisitions, notification was required when the notice of the transaction was published in the Official Journal, when the competition authorities decided to initiate proceedings and in general “*far enough in advance of the adoption of a decision in the case to enable the other Party’s views to be taken into account.*” With respect to other matters, notification should be given as soon as ‘notifiable’ circumstances were present and far enough in advance of the issuance of a statement of objectives and the adoption of a decision or settlement. Notification under the 1991 Agreement is also required “*whenever ... competition authorities intervene or otherwise participate in a regulatory or judicial proceeding that does not arise from its enforcement activities*”. Article II 1991 EU-US Agreement.

¹¹⁶³ Article II (8) 1991 EU-US Agreement.

¹¹⁶⁴ Message relatif à l’approbation de l’accord entre la Suisse et l’Union européenne concernant la coopération en matière d’application de leurs droits de la concurrence, 13.044, 22 mai 2013.

¹¹⁶⁵ Ibid.

¹¹⁶⁶ The use of the word ‘shall’ indicates an obligation. Article 4 EU-Switzerland Agreement.

¹¹⁶⁷ Telephone interview with Patrik Ducrey, member of the Swiss negotiating team for the EU-Switzerland second generation Agreement, 24 February 2017.

¹¹⁶⁸ Article IV (d) 1991 EU-US Agreement.

¹¹⁶⁹ Article IV(4) of the 1991 EU-US Agreement mentions that “*the competition authorities of either Party may limit or terminate their participation in a coordination arrangement and pursue their enforcement activities independently*”

enforcement activity.¹¹⁷⁰ While the difference may not be that great in practice, semantically the focus seems to be on the termination of particular routes of coordination rather than the coordination process in its entirety. This semantic ‘nuance’, however, does little to lift up the Agreement, which fails to deliver when it comes to installing discipline in the cooperation process (see below, Part II, 3.6.7).

The concept of negative comity is formally integrated in the Agreement.¹¹⁷¹ The competition authorities are to give ‘careful consideration’ to the important interests of the other Party. This is a relatively stronger obligation than in the 1991 EU-US Agreement, where the softer expressions ‘taking into account’ and ‘considering’ are used.¹¹⁷² The EU-Switzerland Agreement refers to the parties’ ‘respective interests’ rather than ‘competing interests’ when enumerating some relevant factors to be taken into account when seeking appropriate accommodation. This reflects a less hostile and more trusting attitude.¹¹⁷³ Factors to be taken into account in seeking appropriate accommodation differ in substance from the ones in the 1991 EU-US Agreement. As the lists are non-exhaustive, however, the practical relevance of these differences is limited.¹¹⁷⁴

Despite the modest results that the positive comity principle has produced in the past (see above, Part II, 2.2.4.2 and 2.2.4.3), it is reiterated in Article VI of the EU-Switzerland Agreement. The principle is formulated in somewhat different terms than in the 1991 EU-US Agreement. More emphasis is put on the *potential* effects of certain behaviour.¹¹⁷⁵ The wording was inspired by the FTAs with Korea and Japan, and was not put into question.¹¹⁷⁶ Whereas in the 1991 EU-US Agreement enforcement action could be requested when a party believed that anticompetitive

¹¹⁷⁰ Article IV(4) 1991 EU-US Agreement.

¹¹⁷¹ Article V EU-Switzerland Agreement.

¹¹⁷² Article VI 1991 EU-US Agreement.

¹¹⁷³ Both negative comity provisions differ from each other in other aspects as well, for instance regarding the principles that should be taken into account in considering the important interests of the other party (see Article VI(1) and (2) 1991 EU-US Agreement).

¹¹⁷⁴ The latter Agreement refers first of all to the relative significance of conduct within the enforcing party’s territory to the anticompetitive activities involved, compared to conduct within the other party’s territory. This factor is reiterated in the EU-Switzerland agreement, albeit in slightly different terms. The second factor in the 1991 EU-US Agreement, dealing with whether or not there is a purpose present when engaging in anticompetitive activities to affect consumers, suppliers or competitors within the enforcing Party’s territory, was not reiterated in the EU-Switzerland Agreement. The intent of the parties is thus no longer predominant. A third factor relates to the relative significance of the effects on the enforcing party’s interests of the anticompetitive behaviour as compared to the other party’s interests. This factor is also incorporated in the EU-Switzerland Agreement, although it is added that also *potential* effects should be taken into account. Whether enforcement activities would advance or defeat reasonable expectations constitutes another factor in the EU-US Agreement that has been left out of the EU-Switzerland agreement. The concept of ‘reasonable expectations’ constitutes a potential source of conflict due to its opacity. For this reason its omission in the EU-Switzerland Agreement is to be applauded. Another element that is not reiterated in the EU-Switzerland Agreement is the extent to which the enforcement activities and the other Party’s laws or articulated economic policies are consistent or conflicting. This might be related to the fact that it is also no longer required that important interests would normally be reflected in antecedent laws or other official documents. What has remained a factor to consider in both agreements is the degree to which “*enforcement activities of the other Party with respect to the same persons, including judgments or undertakings resulting from such activities, may be affected.*” A new element in the EU-Switzerland Agreement is exactly this undertaking-oriented focus, incorporated in an additional factor relating to the extent of possible conflicting requirements for undertakings. Article 5(3) EU-Switzerland Agreement: “[...] *the competition authority of the Party concerned should consider the following factors, in addition to any other factor that may be relevant in the circumstances.*”

¹¹⁷⁵ As was the case with the factors mentioned in Article V of the EU-Switzerland Agreement to take into account when looking for appropriate accommodation. This in contrast with the EU’s first generation agreements.

¹¹⁷⁶ Telephone interview with Patrik Ducrey, member of the Swiss negotiating team for the EU-Switzerland second generation Agreement, 24 February 2017.

activities carried out on the territory of the other party *were* adversely affecting its important interests,¹¹⁷⁷ now it is already possible if a party believes that these activities *may* adversely affect its important interests. This does not seem to have led to more intensive application of the positive comity principle, but may indicate that at least informally both parties feel more comfortable in reaching out to each other. What constitutes ‘important interests’ is left to the appreciation of the competition authorities. The interests listed in Article 3(2) of the Agreement, on notifications, may serve as point of reference. Also, instead of ‘considering’ the request to initiate or expand enforcement activities, the obligation is made somewhat stronger in the EU-Switzerland Agreement by requiring from the signatories to ‘carefully consider’ taking action. The comity provision cannot be used, however by one competition authority to ask another competition authority to gather evidence on its behalf.¹¹⁷⁸

Upon request, parties can consult each other about the implementation issues that may arise under the Agreement, and they can consider reviewing and refining its operation. Amendments to laws and regulations and changes in the enforcement practice of their competition authorities that could affect the operation of the Agreement should be communicated as soon as possible, and the parties should consult in assessing the potential impact on the Agreement. Meetings between the competition authorities of the Parties should occur at the appropriate level, on request of either competition authority.¹¹⁷⁹ Implementation of this provision is encouraged by the European Parliament, which considers the careful monitoring of the implementation of the agreement essential to draw lessons from the experience and test potentially problematic issues.¹¹⁸⁰ The OECD has labelled this provision as ‘rather unique’,¹¹⁸¹ but it has been present (albeit in different sections of the agreements, not under ‘consultations’, but in the final provisions) in the EU’s first generation agreements as well.¹¹⁸² The provision moreover is not particularly strong, as there is no obligatory review after two or five years after entry into force for instance.

Finally, to facilitate the communication process, it is stated that unless otherwise agreed communications should be in English, and that within the competition authority of each party a contact point should be designated, particularly to deal with any matter relating to the implementation of the agreement.¹¹⁸³ The inclusion of this type of ‘practicalities’ in the Agreement is to be applauded as they provide tangible guidance to agencies willing to cooperate. Competition authorities should be transparent in the designation of this contact point, for instance be clearly indicating such information on their website.

3.2.4 Conditions for exchange or discussion of information

¹¹⁷⁷ Article V 1991 EU-US Agreement.

¹¹⁷⁸ Message relatif à l’approbation de l’accord entre la Suisse et l’Union européenne concernant la coopération en matière d’application de leurs droits de la concurrence, 13.044, 22 mai 2013.

¹¹⁷⁹ Article 11 EU-Switzerland Agreement.

¹¹⁸⁰ European Parliament Resolution on EU Cooperation Agreements on Competition Policy Enforcement – The Way Forward, 2013/2921(RSP), 5 February 2014, paragraph 6.

¹¹⁸¹ OECD, Report/Inventory on provisions contained in existing international co-operation agreements - Note by the Secretariat, DAF/COMP/WP3(2014)10, 16 December 2014, 21.

¹¹⁸² Article 11(3) EU-Korea Agreement; Article 12(3) EU-Japan Agreement; Article XII(3) EU-Canada Agreement; Article XI(3) 1991 EU-US Agreement.

¹¹⁸³ Article 12 EU-Switzerland Agreement. This will likely remain the case even after Brexit, as English remains the most spoken second language in Europe, even when compared to French. (<http://languageknowledge.eu>).

One particular type of investigatory assistance is information exchange.¹¹⁸⁴ Unlike other second generation agreements, the EU-Switzerland Agreement distinguishes between two types of inter-agency contacts: the sharing of views or discussion, and the exchange or transmission of information. Both types of contact are treated differently, allowing for some flexibility. On the one hand, any information, including that obtained by investigative process, necessary to carry out the cooperation and coordination provided under the Agreement, may be orally discussed by the parties. Only two exceptions apply: leniency or settlement information may only be discussed with express consent in writing of the undertaking providing the information, and information of which the use would be prohibited under the applicable procedural rights and privileges of the parties cannot be discussed at all. Transmitting information in writing, on the other hand, is subject to several conditions. According to a cascade system, conditions for exchange gradually become stricter according to the level of confidentiality of the information involved.¹¹⁸⁵ First, in contrast with the US-Australia Agreement allowing active gathering of information on behalf of the partner authority,¹¹⁸⁶ the information must be in the possession of the competition authority. It must be collected within the framework and for the purposes of domestic proceedings. Second, information may only be transmitted when the undertaking that has provided the information gives its express consent in writing. When the relevant information involves personal data, the transmission of such data is only allowed in case the parties' competition authorities are investigating the same or related conduct or transaction. The parties shall ensure the protection of this data in accordance with their respective legislations.¹¹⁸⁷

The major innovation of the Agreement is that if consent by the party that provided the information is lacking, information can nevertheless be transmitted for use as evidence under certain conditions.¹¹⁸⁸ The value of this innovation does not so much lie in the actual exchange of confidential information or evidence, as this will likely only happen in a limited number of cases in which the conditions are fulfilled, but rather in the fact that in this manner competition authorities can truly speak freely with each other and have access in their daily work to information that was previously protected by official secrecy.¹¹⁸⁹ Again, the information must be in the possession of the transmitting competition authority and may only be transmitted in case both competition authorities are investigating the same or related conduct or transaction, a restriction that seems to be unique to the EU-Switzerland Agreement.¹¹⁹⁰ The request should be made in writing and its content is determined by the Agreement.¹¹⁹¹ These conditions mainly serve to ensure respect for the proportionality principle and to exclude the risk of fishing expeditions.¹¹⁹² The decision whether

¹¹⁸⁴ OECD, Inventory of co-operation agreements, Note by the secretariat, DAF/COMP/WP3(2015)12/REV1, 20 November 2015, 14.

¹¹⁸⁵ Message relatif à l'approbation de l'accord entre la Suisse et l'Union européenne concernant la coopération en matière d'application de leurs droits de la concurrence, 13.044, 22 mai 2013.

¹¹⁸⁶ Article II E US-Australia Agreement.

¹¹⁸⁷ Article 7(3) EU-Switzerland Agreement.

¹¹⁸⁸ Article 7(4) EU-Switzerland Agreement.

¹¹⁸⁹ P. Ducrey, "The Agreement between Switzerland and the EU concerning cooperation in the Application of their competition laws", *Journal of European Competition Law & Practice*, Vol. 4, No. 5, 2013, 444.

¹¹⁹⁰ OECD, Inventory of co-operation agreements, Note by the secretariat, DAF/COMP/WP3(2015)12/REV1, 20 November 2015, 18-19.

¹¹⁹¹ It "shall include a general description of the subject matter and the nature of the investigation or proceedings to which the request relates and the specific legal provisions involved. It shall also identify the undertakings subject to the investigation or procedure whose identity is available at the time of the request [...]." Article 7(4)(b) EU-Switzerland Agreement.

¹¹⁹² Message relatif à l'approbation de l'accord entre la Suisse et l'Union européenne concernant la coopération en matière d'application de leurs droits de la concurrence, 13.044, 22 mai 2013. Fishing expeditions are not allowed in the EU in relation to products that appear to be out of scope of a Commission raid, as clarified in the *Nexans* case-law, even though

information is relevant and suitable for transmission should occur in consultation with the requesting competition authority. In contrast, the decision whether or not to actually exchange the information is left entirely to the discretion of the authority in possession of the information.¹¹⁹³ While some discretion is desirable and cooperation should not be forced upon an agency, this complete freedom for the authorities risks to thoroughly undermine the strength of this provision, in particular considering the strict conditions the Agreement imposes with regard to both the exchange and use of the information.

While cooperation among competition authorities cannot be forced upon the latter, some ‘nudging’ towards cooperation would, however, be welcome.¹¹⁹⁴ As with first generation agreements, it would install a certain discipline in the cooperation process if authorities were at least obliged to state reasons for not cooperating. Nudging originally referred to the alteration of social or physical environments to make certain behaviours more likely without forbidding any options. Without relying on regulation, subtle alterations in the choices of people were aimed to change their behaviour.¹¹⁹⁵ People were guided towards the choice lining up with their best interest, but they remained free to behave differently.¹¹⁹⁶ Nudging typically excludes legislation, regulation, and interventions that would alter economic incentives and draws on behavioural economics and social psychology to explain why people deviate from economically rational behaviour to inform policy. A nudge is therefore liberty preserving, relying on the automatic, reflexive responses of those targeted, not involving overly overt persuasion or significantly changing economic incentives, but rather redesigning the choice context according to the findings of behavioural economics. The increased interest in behavioural economics when shaping policy was likely influenced by the 2008 global financial crisis, as insufficient regulation of the financial service sector at least in part lay at its roots.¹¹⁹⁷ The concept is aimed at altering the behaviour of individuals, but it is suggested here that it can be applied to enforcers as well.¹¹⁹⁸ A schematic overview is given of the information exchange system in the EU-Switzerland Agreement. Aspects of it will be discussed in more detail when addressing the concerns present regarding information exchange (see below, Part II, 3.5).

the Commission retains a wide discretion. The Commission may only examine product areas in which it has ‘reasonable grounds’ to suspect an infringement. See Judgment of 14 November 2012, *Nexans v European Commission*, T- 135/09, EU:T:2012:596; paragraph 67. On appeal, see Judgment of 25 June 2014, *Nexans v European Commission*, C-37/13, EU:C:2014:2030.

¹¹⁹³ Article 7(5) EU-Switzerland Agreement.

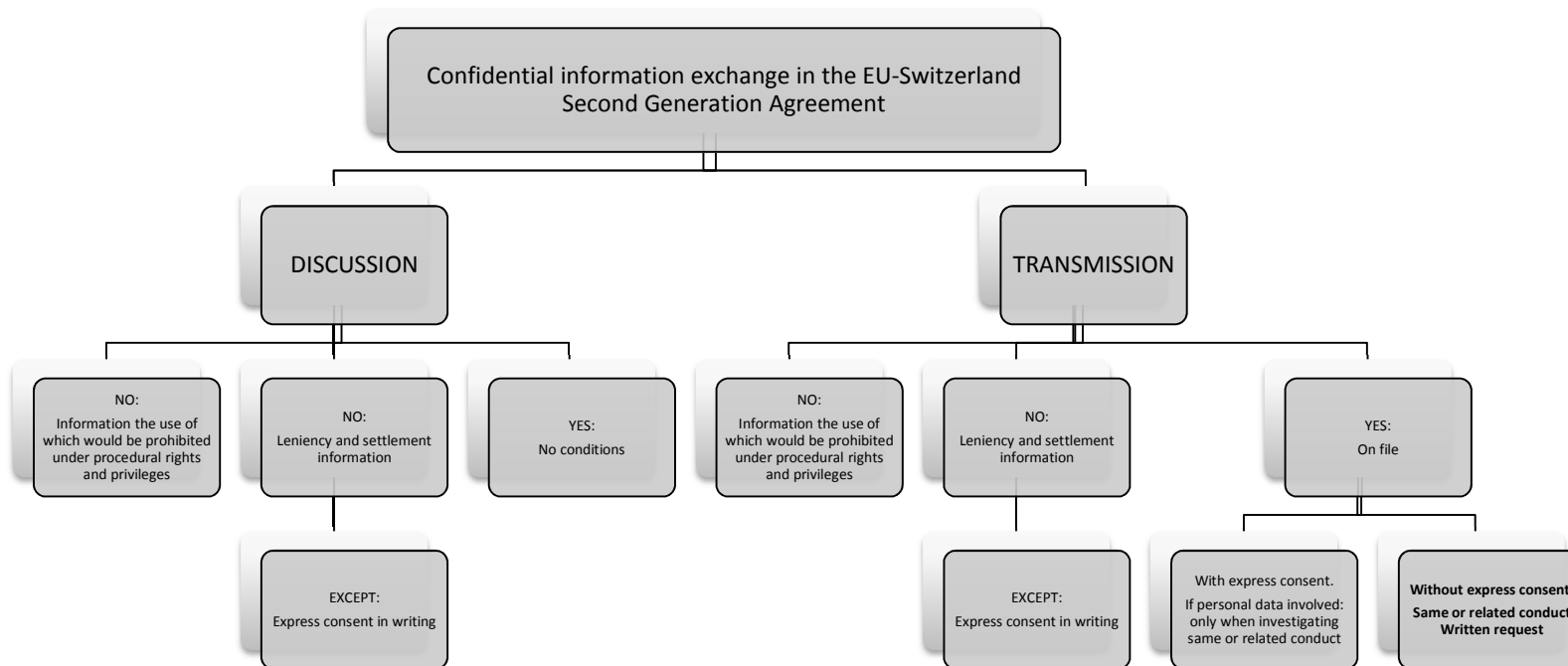
¹¹⁹⁴ Guldborg Hansen, Pelle, “What is Nudging?”, Behavioral Science & Policy Association, 16 August 2016, available at <https://behavioralpolicy.org/what-is-nudging/> (accessed March 2017).

¹¹⁹⁵ A. Oliver, “From Nudging to Budging: Using Behavioural Economics to Inform Public Sector Policy”, *Journal of Social Policy*, July 2013, available at <https://intranet.weatherhead.case.edu/document-upload/docs/1139.pdf> (accessed March 2017), 1.

¹¹⁹⁶ This freedom is relative. Nudging inevitably involves some covertness. The intention is that people face the changes in the choice architecture unconsciously. It is therefore difficult to see how they can make the conscious decision to opt-out. A. Oliver, “From Nudging to Budging: Using Behavioural Economics to Inform Public Sector Policy”, *Journal of Social Policy*, July 2013, available at <https://intranet.weatherhead.case.edu/document-upload/docs/1139.pdf> (accessed March 2017), 3.

¹¹⁹⁷ A. Oliver, “From Nudging to Budging: Using Behavioural Economics to Inform Public Sector Policy”, *Journal of Social Policy*, July 2013, available at <https://intranet.weatherhead.case.edu/document-upload/docs/1139.pdf> (accessed March 2017), 1, 4-5. The UK government even has a ‘nudge unit’, the Behavioural Insights Team, which has released a number of reports on theory, methods and applications in such areas as health-related behaviours, personal energy saving and reducing tax fraud (A. Oliver, “From Nudging to Budging: Using Behavioural Economics to Inform Public Sector Policy”, *Journal of Social Policy*, July 2013, available at <https://intranet.weatherhead.case.edu/document-upload/docs/1139.pdf> (accessed March 2017), 8.)

¹¹⁹⁸ T. Marteau, “Judging nudging: can nudging improve population health?”, *The BMJ*, Vol. 342, 29 January 2011, 1.



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¹¹⁹⁹ Figure 9. Chart constructed by author.

In the summer of 2014, after the signing of the EU-Switzerland Agreement but before its entry into force, a new article 42b was added to the Swiss Cartel Act, regulating information exchange between the Swiss Competition Commission and its peers. The article entered into force on the same date as the EU-Switzerland Agreement and lays down some general conditions under which confidential information exchange with a foreign competition authority can take place.¹²⁰⁰ Article 42b CartA on the disclosure of data to foreign competition authorities states:

“1 Data may only be disclosed to a foreign competition authority based on an act, an international agreement or with the consent of the undertaking concerned.

2 Without the consent of the undertaking concerned, the competition authorities may disclose confidential data, in particular business secrets, to a foreign competition authority on the basis of an international agreement only if:

- a. the behaviour under investigation in the recipient state is also unlawful under Swiss law;*
- b. both competition authorities are investigating the same or related behaviour or transactions;*
- c. foreign competition authority uses the data only for the purpose of applying provisions of competition law or as evidence in relation to the subject matter of the investigation for which the competition authority requested the information;*
- d. the data is not used in criminal or civil proceedings;*
- e. the foreign procedural law safeguards party rights and official secrecy; and*
- f. the confidential data is not disclosed to the foreign competition authority in the context of an amicable settlement (Art. 29) or when assisting in the discovery and elimination of the restraint of competition (Art. 49a para. 2).*

*3 The competition authorities shall notify the undertaking concerned and invite it to state its views before transmitting the data to the foreign competition authority.”*¹²⁰¹

Remarkably, those conditions do not entirely coincide with the provisions of the EU-Switzerland Agreement. First, the article requires the competition authorities to notify the undertakings concerned of potential information exchanges. This is not the case in the EU-Switzerland Agreement. Second, while there is no ‘double illegality’ requirement in the EU-Switzerland Agreement,¹²⁰² the Swiss Cartel Act does require that in order to exchange confidential information without consent, the behaviour under investigation in the recipient state should also be unlawful under Swiss law.¹²⁰³ It seems therefore that competition laws of a foreign nation that do not imitate US antitrust law are simply not considered ‘antitrust laws’ under the US’ AMAAs. Art. 42b CartA also provides a clearer restriction on the use of transmitted information in civil matters than the EU-

¹²⁰⁰ M. Meinhardt & B. Merkt, “Cooperation Agreement between Switzerland and the EU on competition law enters into force”, *Lexology*, 14 November 2014.

¹²⁰¹ Inserted by the Annex to the Federal Decree of 20 June 2014 on the Approval of the Agreement between Switzerland and the EU concerning Cooperation on the Application and Implementation of their Competition Laws, in force since 1 December 2014. See <https://www.admin.ch/opc/en/classified-compilation/19950278/index.html> (accessed January 2017).

¹²⁰² Article 2(4) of the EU-Switzerland Agreement defines ‘anticompetitive activities’ as “any activities that may be subject to a prohibition, sanctions or other relief measures by competition authorities under the competition laws of one of the Parties or both Parties.”

¹²⁰³ In the US-Australia Agreement it is stated that assistance may be provided to a foreign authority independently of whether the conduct at stake violates federal antitrust laws (15 USC Section 6202(c)). This way, US agencies can provide assistance without having to determine prima facie whether US laws would be violated (Senate Committee on the Judiciary, Report on the IAEAA of 1994, N° 103-388, 103rd Cong. 2d Sess, 30 September 1994, 11, as cited in Zanettin, *Cooperation between antitrust agencies at the international level*, Portland, Hart Publishing, 2002, 159). At first sight this facilitates and broadens cooperation possibilities, but this is severely limited by the definition of ‘foreign antitrust laws’ in the IAEAA. Such laws are defined as “the laws of a foreign state, or of a regional economic integration organization, that are substantially similar to any of the Federal antitrust laws and that prohibit conduct similar to conduct prohibited under the Federal antitrust laws.” (15 USC Section 6211(7). Emphasis by author).

Switzerland Agreement, although this could be caught in the Agreement under Article 8(5), allowing that use of the information is subjected to certain terms and conditions as specified by the providing authority.¹²⁰⁴

Article 42b CartA was created during the ratification process of the EU-Switzerland Agreement. Some sceptical voices in Parliament raised concerns considering the EU-Switzerland Agreement, in particular concerning the extent to which the legal positions of the undertakings concerned were protected. For this reason Article 42b was proposed to amend the Swiss cartel act and ‘surround’ latter Agreement. More specifically some members of Parliament wanted to insert a possibility for intermediary appeal. It was raised that this would make cooperation with the EU impossible due to the time and efficiency problems this would entail. An appeal-possibility against information transmission was therefore considered impossible. As a concession, the third paragraph of Article 42b contains the obligation to notify the parties. The competition authority must consult the company before sending confidential information. This gives the company the opportunity to comment and the competition authority the opportunity to consider the concerns of the company without blocking the process. The obligation is asymmetrical. The EU is not obliged to do this. It is a domestic measure, which was considered an appropriate and balanced solution for the protection of the interests of the companies concerned.¹²⁰⁵ The double criminality requirement is intended to exclude the possibility of criminal sanctions against natural persons.¹²⁰⁶ In short, Article 42b CartA contains extra assurances for the Swiss intended to reinforce the legal position of the Swiss companies concerned. The exact interplay between Art. 42b CartA and the Cooperation Agreement will ultimately have to be addressed and clarified by the COMCO and possibly the courts. While generally international agreements take precedence over domestic statutes, the differences in language and the entry into force at the same time as the Cooperation Agreement, seem to indicate that Art. 42b CartA at least completes, or indeed ‘surrounds’ the Cooperation Agreement.¹²⁰⁷ The fact that the Swiss felt the need to unilaterally ensure further safeguards points to the flaws and opacities of the Agreement. It is, to say the least, a bizarre way to engage in international cooperation.

This crucial cooperation mechanism functions differently in the US. In the US requests for assistance should be addressed to and are decided upon by the Attorney General.¹²⁰⁸ It is not explicitly specified whether an e-mail would suffice, the broader scope of assistance allowed by the US-Australia Agreement may require a greater level of formality. The EU-Switzerland Agreement is silent on who decides on requests and merely refers to the competition authorities of the parties as unitary actors. In practice, in Switzerland, it generally is the case team that decides. It is not a formal, contestable decision.¹²⁰⁹ The Agreement does explicitly state that notifications may take place via electronic

¹²⁰⁴ P. Kobel & D. Viros, “Cooperation Agreement – Investigations – Confidentiality obligations: The European Union and Switzerland reach the agreement concerning the application of their competition law entering in force on 1st December 2014”, *Concurrences*, N° 2- 2015, 213.

¹²⁰⁵ Conseil des Etats Session d'été 2014 - Quatrième séance 05.06.14 08h15 13.044 , Zweitrat - Deuxième Conseil.

¹²⁰⁶ Telephone interview with Patrik Ducrey, member of the Swiss negotiating team for the EU-Switzerland second generation Agreement, 24 February 2017.

¹²⁰⁷ P. Kobel & D. Viros, “Cooperation Agreement – Investigations – Confidentiality obligations: The European Union and Switzerland reach the agreement concerning the application of their competition law entering in force on 1st December 2014”, *Concurrences*, N° 2- 2015, 213.

¹²⁰⁸ 15 USC Section 6202(a).

¹²⁰⁹ Telephone interview with Patrik Ducrey, member of the Swiss negotiating team for the EU-Switzerland second generation Agreement, 24 February 2017.

means.¹²¹⁰ Article III of the US-Australia Agreement describes in a detailed manner the elaborate minimum content of a request. Requests should moreover be accompanied by written assurances that the confidentiality laws and procedures, as described in Annex A of the Agreement, have not significantly modified.¹²¹¹ The US should indicate in its requests whether the information sought may be used for criminal proceedings.¹²¹² This requirement was included because the 1992 Mutual Assistance in Business Regulation Act (MABRA) applies certain constraints to information exchange when the investigation could result in criminal proceedings.¹²¹³ Some flexibility is nevertheless offered as requests may be modified.¹²¹⁴

While the scope of assistance allowed under the US-Australia Agreement is quite broad, certain limitations apply. Article IV enumerates four grounds on which assistance may be denied in whole or in part, repeating what is stated in the IAEAA. The most controversial factor is the public interest of the requested party, as it holds great possibility for abuse due to its opacity. The central concept of reciprocity, however, forms a restraint to potentially abusive behaviour. If one authority would invoke this provision too often or in bad faith, the other authority could reciprocate and reduce the worth of the agreement altogether. The reciprocity requirement also plays on a different level. Theoretically the chance of important US interests being harmed by the sharing of information under the agreement is limited as the reciprocity requirement requires that the confidentiality laws and procedures in the partner country offer protection that is equivalent to that offered by the US. The Senate Report on the IAEAA enumerates some factors to be taken into account when assessing potential harm to US public interest, more precisely the nature of the evidence requested, whether unwarranted disclosure of information provided by uninvolved third parties will be avoided and, where the requested evidence is grand jury testimony from an immunized witness, whether the foreign authority will grant similar immunity. The House Report nevertheless mentions that the provision regarding the public interest should permit the antitrust enforcement authorities ‘wide latitude’ in determining whether the public interest would be served by providing the requested information in a given case.¹²¹⁵ Other grounds for refusal of a request for assistance are when the request is not made in accordance to the Agreement, if the execution of the request would exceed the executing authority’s reasonably available resources, or is not authorised by the domestic law of a party.¹²¹⁶ Consultation between the two parties is required before denying a request as well as an explanation. Compared to Article VII(5) of the EU-Switzerland Agreement this provision at least limits the parties’ discretion to a certain extent. In the EU-Switzerland Agreement parties are allowed to refuse a request for any reason, and a motivation is not explicitly required. As in the EU-Switzerland Agreement, undertakings are not notified or offered the possibility of issuing an intermediary appeal. The House Report noted that giving prior notice to the concerned parties is advisable in some cases, but it is not required.¹²¹⁷

¹²¹⁰ Article 3(1) EU-Switzerland Agreement

¹²¹¹ Article III US-Australia Agreement.

¹²¹² Article III(B)(2) US-Australia Agreement.

¹²¹³ P. Holmes, H. Müller, A. Papadopoulos, & A. Sydorak, “A taxonomy of international competition cooperation provisions”, Paper for the International Research and Policy Symposium on ‘Competition Policy for International Development, Growth, and Trade’, organized by Centre for Economic Policy Research, Brussels, December 9-10, 2005, 59.

¹²¹⁴ Article III(D) US-Australia Agreement.

¹²¹⁵ Laraine L. Laudati, Study of exchange of confidential information agreements and treaties between the US and Member States of the EU in areas of securities, criminal, tax and customs (Laudati report), 1996, 13-14.

¹²¹⁶ Article IV(A) US-Australia Agreement.

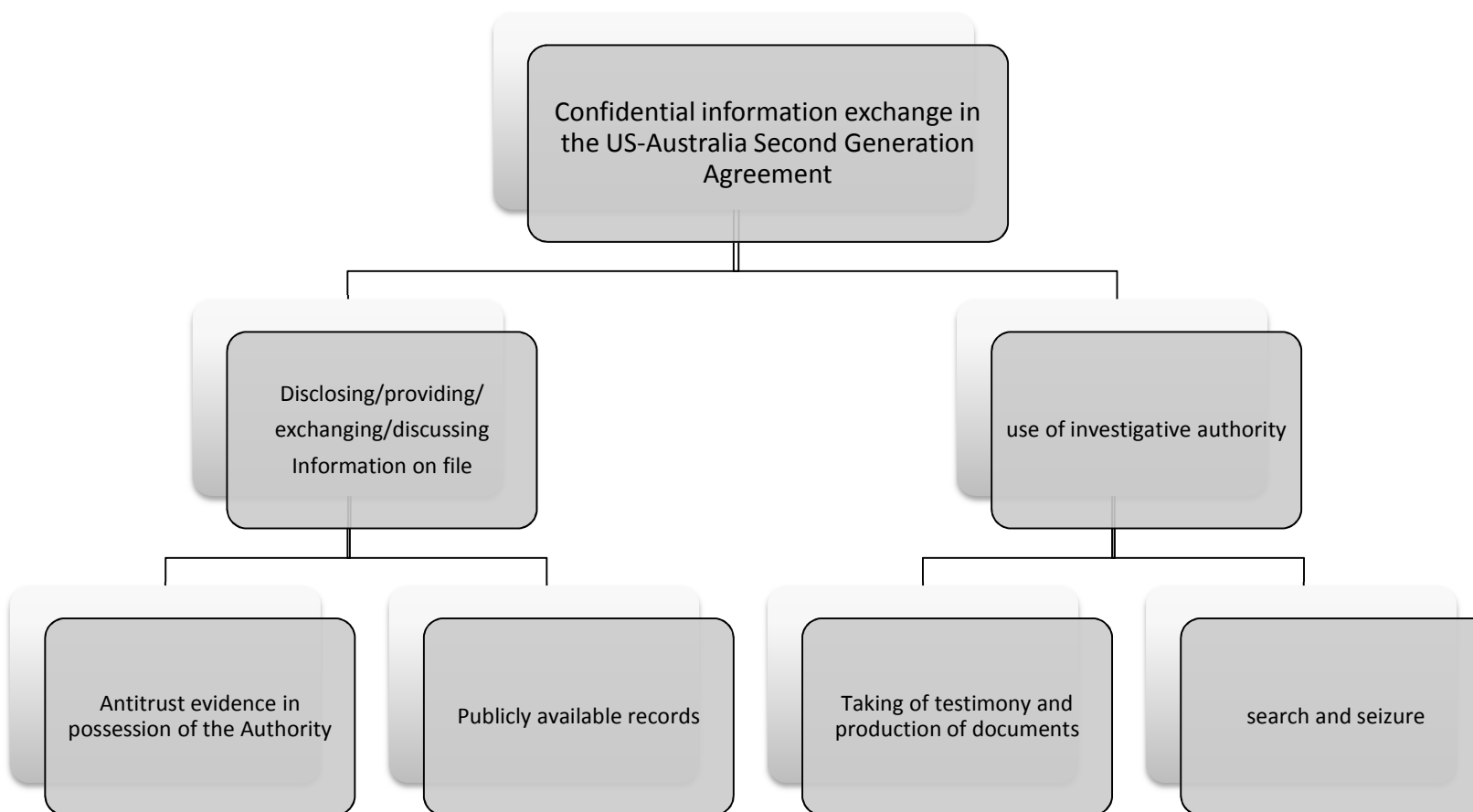
¹²¹⁷ Laraine L. Laudati, Study of exchange of confidential information agreements and treaties between the US and Member States of the EU in areas of securities, criminal, tax and customs (Laudati report), 1996, 13-14.

As the US-Australia Agreement also allows active assistance, the execution of such requests is also regulated in the Agreement. The executing party must promptly provide an initial response, but it may also request additional information or may determine that the request shall only be executed subject to certain specified terms and conditions, which may relate to the way a request is executed or its timing, or the use or disclosure of any antitrust evidence that is provided. This means that Australia could, for instance, reject the use of the information it provides in criminal proceedings. Requests are executed in accordance with the laws of the requested party and according to the method of execution specified in the request, unless it is prohibited by the law of the requested party or unless the executing authority decides otherwise.¹²¹⁸ Once an authority has agreed to provide assistance, the agreement regulates the concrete execution of the different means to obtain evidence, such as the taking of testimony and production of documents, search and seizure, and the return of antitrust evidence.¹²¹⁹ The Agreement moreover provides that unless the parties agree otherwise, the requested party should pay for all execution costs of a request apart from the fees of expert witnesses, translation- and interpretation costs, transcription costs, and the allowances and expenses related to travel to the territory of the Requested Party by officials of the requesting party pursuant the agreement.¹²²⁰ This important aspect of cooperation is not dealt with in the EU-Switzerland Agreement. This may be explained by the fact that information should already be in possession of the national authority if the authority wants to exchange it, and sharing such information will therefore not entail significant extra costs for the authorities.

¹²¹⁸ Article V US-Australia Agreement.

¹²¹⁹ Article IX, X, XI US-Australia Agreement.

¹²²⁰ Article XII US-Australia Agreement.



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¹²²¹ Figure 10. Chart constructed by author.

3.3 Limited use of existing second generation agreements

Since the EU-Switzerland Agreement only entered into force in December 2014 it is too early to judge on its implementation. Up until February 2017 no confidential information was exchanged nor was there any official mention of the use of the EU-Switzerland Agreement. Nevertheless many contacts have since taken place between EU and Swiss colleagues, in particular with regard to financial markets.¹²²² It is therefore useful to look at the track record of the IAEEA and the US-Australia Agreement, which have been in force since 1994 and 1999 respectively.

The agreement with Australia remains the only agreement concluded under the IAEEA to date, even if in 2003 it was stated that ‘efforts were under way’ with Canada, France, Denmark and the Netherlands, among others.¹²²³ While the IAEEA significantly broadened the scope of cooperation possibilities between competition agencies, its limited use indicates that some problems persist. Moreover, not only is the US-Australia Agreement the only agreement concluded so far under the regime of the IAEEA, the use of the agreement itself also appears to have been quite limited. While it is sometimes claimed that the US-Australia Agreement has been used ‘on several occasions’,¹²²⁴ others restrict themselves to saying that the agreement has been relied upon ‘at least once’, in particular in the infamous *Vitamins* cartel case.¹²²⁵ The opacity surrounding the use of the Agreement is illustrated by the fact that the latter statement, originally from First in 2001, is still used in OECD reports of 2012.¹²²⁶ In its 2012 contribution to the Global Forum on Competition, Australia provides an example of cooperation under the US-Australia Agreement, whereby it is made more clear how cooperation takes place in practice. It is described that the ACCC made a request under the US-Australia Agreement for access to documents that were produced to a Grand Jury as part of a US DoJ investigation. Before a formal request was made, the ACCC liaised with the DoJ on an informal level to discuss the scope of the request and the documents sought. The relevant US District Court then released the documents after request by the DoJ. Next, Australian competition officials travelled to the US in order to inspect the relevance of the documents. The US Attorney-General approved release of the documents by the US DOJ to the ACCC on public interest grounds and following the terms of the Agreement, the documents were provided to the ACCC. The ACCC

¹²²² Telephone interview with Patrik Ducrey, member of the Swiss negotiating team for the EU-Switzerland second generation Agreement, 24 February 2017.

¹²²³ D. Klawiter & C. Laciak, “International Competition Cooperation: No Longer Just the Formal Agreements”, *The Antitrust Review of the Americas, A Global Competition Review Special Report*, 2003, 26.

¹²²⁴ B. Zanettin, *Cooperation between antitrust agencies at the international level*, Portland, Hart Publishing, 2002, 161; P.J. White, “International judicial assistance in antitrust enforcement: the shortcomings of current practices and legislation, and the roles of international organizations”, *Administrative Law Review*, Vol. 62, No. 1, 2010, 265.

¹²²⁵ H. First, “The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law”, *Antitrust Law Journal*, Vol. 68, No. 3, 2001, as cited in OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 37; P. Holmes, H. Müller, A. Papadopoulos, & A. Sydorak, “A Taxonomy of International Competition Cooperation Provisions”, paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 59; M. Chowdhury, “From paper promises to concrete commitments: Dismantling the obstacles to transatlantic cooperation in cartel enforcement”, AAI Working Paper No. 11-09, November 28, 2011, 12, footnote 69: “In relation to the *Vitamins* cartel, the Australian Competition and Consumer Commission (ACCC) announced that it would be investigating the case and Chairman Fels noted the ‘recently signed antitrust cooperation treaty with the U.S.’ and disclosed that the ACCC already has contacted U.S. authorities about obtaining information ‘to further its considerations’.”

¹²²⁶ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 13.

respected the confidentiality of the documents and after they no longer had any use for the authority, they were returned to the DoJ.¹²²⁷

One of the reasons for the limited use of the IAEAA could be the high eligibility-threshold to negotiate an AMAA with the US, considering the strict reciprocity requirements imposed by the IAEAA. Few nations have a rule-set as elaborate and intricate as the US competition system, excluding them as a cooperation partner for the US under the IAEAA.¹²²⁸ Another reason is a lack of credibility from the US authorities. The feeling may exist that states would gain little from an AMAA with the US. The aggressive extraterritorial approach of the US in the past has led countries to believe that that entering into an agreement under the IAEAA would imply asymmetrical benefits at a considerable sunk cost involved in the negotiation of the agreement.¹²²⁹ This perception could be countered or at least diminished by active promotion of positive instances of cooperation under the existing US-Australia Agreement, but only very little information is available about the functioning of the Agreement. More generally, the OECD/ICN Joint Survey report indicated that the six respondents with information gateways or enabling legislation in place, could not provide useful data regarding their use.¹²³⁰ According to TAYLOR the limited use of the possibilities offered by the IAEAA also reflects *“the fact that most nations continue to guard their corporate information jealously, partly for fear of cross-border industrial espionage.”*¹²³¹ Finally, some have pointed to the ‘rigidity’ or ‘compelled formality’ of the IAEAA as a source of trouble, and suggest single-case agreements or test protocols as a cautious way forward.¹²³² This would, however, undermine the whole idea of concluding cooperation agreements, as these should provide both the competition agencies as the companies involved with a clear and structured framework within which cooperation can evolve.

3.4 A particular challenge: the concept of ‘confidential information’

Having outlined the scope and content of the EU-Switzerland agreement, as well as the limited use of existing second generation agreements, it becomes clear that one central issue arises. As mentioned, the main difference between first and second generation agreements is that the latter allow the exchange of confidential information. But what is confidential information? In first generation agreements reference is made to national legislation with regard to the confidentiality of documents, resulting in opacity with regard to what sort of information may and may not be exchanged. In second generation agreements the delineation of the term is important with regard to the protection offered once information has been exchanged. Before analysing the concerns regarding advanced international cooperation among competition agencies, this broader issue deserves to be addressed. What is understood as ‘confidential information’ is of high relevance because it implies that agencies are limited in whether, to whom, and how they can disclose this

¹²²⁷ OECD, Global Forum on Competition, Improving international co-operation in cartel investigations, Contribution from Australia, DAF/COMP/GF/WD(2012)36, 24 January 2012, 5.

¹²²⁸ OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Background Note, DAF/COMP/GF(2012)6, 13 February 2012, 21-22.

¹²²⁹ M. Martyniszyn, “Discovery and evidence in transnational antitrust cases: current framework and the way forward”, Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law, University College Dublin - School of Law, September 2012, 41. Available at <http://ssrn.com/abstract/=2142978> (accessed August 2016).

¹²³⁰ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 89.

¹²³¹ M. Taylor, *International Competition Law: a new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 115.

¹²³² D. Wood, “Is cooperation possible?”, Luncheon Speech, *New England Law Review*, Vol. 34, No. 1, 110-111.

information.¹²³³ International law firms state that a lot of effort is put in defining confidential information due to its strategic value and confirmed that what can be disclosed is very different in different parts of the world.¹²³⁴

There is no consensus on what constitutes ‘confidential information’ in the context of international competition cooperation.¹²³⁵ Reference is often made to national confidentiality rules,¹²³⁶ which results in opacity, as a definition of confidential information, if it exists, is not necessarily contained in a clear legal statute, but is sometimes developed via enforcement practice or via the courts.¹²³⁷ The 2014 ICN Agency Effectiveness Project on Investigative Process found that the majority of responding agencies supplemented their statutory provisions on confidentiality with either agency rules, regulations, guidelines, or practices.¹²³⁸ One example is the US, where the concept of confidential information in an antitrust context is constructed by various federal statutes, rules, and policies.¹²³⁹ Also in the EU the rules are dispersed (see below, Part II, 3.2.1.1 and 3.4.2). Even if a statutory definition exists, it may vary depending on the legal context, or may be imported from another legal framework.¹²⁴⁰ Definitions can vary even within one jurisdiction, depending on the statutory provisions that the agency is applying. The existence of different conceptions of what constitutes confidential information presents an obstacle to effective cooperation. The fact that such conceptions are often opaque or difficult to find adds to the confusion. As mentioned, companies spend much time and effort trying to demonstrate that the information provided is in fact confidential.¹²⁴¹ The ‘resource impact’ of this process cannot be ignored. Whether it are the parties that need to produce redacted non-confidential versions or the competition agency that redacts the information received, it will often be so that competition agencies and submitters engage in extensive consultations to determine what information in the submissions can be labelled as confidential. This constitutes a significant workload for both the agencies as well as the submitters, with the potential to delay investigations.¹²⁴² Competition agencies themselves have indicated being confused about the distinction between commercially sensitive information constituting a business or trade secret, and non-public information that is not commercially sensitive but is nevertheless required to be treated as

¹²³³ OECD, Discussion on how to define confidential information, Contribution of the United States, DAF/COMP/WP3/WD(2013)55, 29 October 2013, 3.

¹²³⁴ Result of author’s law firm survey (see Annex I).

¹²³⁵ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 87.

¹²³⁶ As was done for instance in the questionnaire sent out by the ICN leading to the 2007 Report: “*Confidential information refers to information which is defined as such by the law of the jurisdiction which is answering this questionnaire. For example, information could be defined as confidential if it constitutes business secrets of a company or if its disclosure in normal circumstances could prejudice the commercial interests of a company.*” ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 33.

¹²³⁷ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 87.

¹²³⁸ ICN, Agency Effectiveness Project on Investigative Process – Competition Agency Confidentiality Practices, April 2014, 8.

¹²³⁹ OECD, Discussion on how to define confidential information, Contribution of the United States, DAF/COMP/WP3/WD(2013)55, 29 October 2013, 3.

¹²⁴⁰ ICN, Agency Effectiveness Project on Investigative Process – Competition Agency Confidentiality Practices, April 2014, 13-14.

¹²⁴¹ OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Background Note, DAF/COMP/GF(2012)6, 13 February 2012, 28; OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 87.

¹²⁴² ICN, Agency Effectiveness Project on Investigative Process – Competition Agency Confidentiality Practices, April 2014, 12.

confidential (see below, Part II, 3.4).¹²⁴³ The problem is well-known. Multilateral forums such as the OECD and the ICN, as well as business organisations such as the ICC, have addressed competition agency confidentiality practice in an international setting.¹²⁴⁴ The OECD/ICN Joint Survey report also indicated that the identification of the types of information that can be exchanged among enforcers was identified as an area in need for improvement. The lack of agreement on the types of information that can be made public regarding the status of investigations was identified as an important factor limiting international cooperation, apart from the lack of a uniform definition and uniform treatment of protected information in general. Differences between legal systems with regard to the scope of legal privilege or data protection systems may further complicate the exchange of information.¹²⁴⁵

Not only should the concept be clear for international cooperation to function properly, it should also be legitimate. Is confidential information ‘anything the companies don’t want in the newspapers’?¹²⁴⁶ Not everything that companies do not want in the newspapers warrants legal protection. Businesses might want to label a document as confidential for many reasons, not all of them justified. To assess the legitimacy of limitations to disclosure one should indeed identify whose interests are being protected and whether such protection is warranted.¹²⁴⁷ For instance, a document could implicate the people involved with the document in illegal conduct, or it could actually contain commercially sensitive information or business secrets that would harm the company’s competitiveness if revealed.¹²⁴⁸ Undertakings seem to use the term ‘confidential’ rather loosely. Both over- and under-disclosure could cause harm to a competition agency and could result in legal challenges possibly leading to the invalidation of (a portion of) a competition agency decision. Over-disclosure could moreover erode the trust companies have when cooperating with competition authorities, while withholding appropriate disclosures would for instance affect private enforcement.¹²⁴⁹ It is beyond doubt that rules on professional secrecy serve a legitimate goal and ensure that undertakings feel secure in providing competition authorities with sensitive information. However, this requires that a delicate balance is struck between the protection of information and the need for effective enforcement and the principles of transparency and openness.

The next section intends to illustrate the opacity surrounding the concepts of confidential information and professional secrecy in the EU. By way of introduction the various ways of classifying information as confidential are studied. The section then provides some insights *de lege ferenda* to broaden the scope of information exchange by exploring whether a more clear categorisation of ‘agency information’ is possible.

¹²⁴³ OECD, International Co-operation – Stocktaking Exercise of the Competition Committee’s Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 36-37.

¹²⁴⁴ For examples of such work, see ICN, Agency Effectiveness Project on Investigative Process – Competition Agency Confidentiality Practices, April 2014, 5.

¹²⁴⁵ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 79-80, 101.

¹²⁴⁶ Comment during 9th ASCOLA Conference on procedural fairness in competition proceedings, Warsaw, 26-28 June 2014.

¹²⁴⁷ M. Chowdhury, “From Paper Promises to Concrete Commitments: Dismantling the Obstacles to Transatlantic Cooperation in Cartel Enforcement”, American Antitrust Institute Working Paper No. 11-09, 28 November 2011, 13.

¹²⁴⁸ As confirmed by S.D. Hammond, “Beating cartels at their own game – sharing information in the fight against cartels”, presented at the Inaugural Symposium of the Competition Policy Research Center - Fair Trade Commission of Japan, Tokyo, 20 November 2003, 6.

¹²⁴⁹ ICN, Agency Effectiveness Project on Investigative Process – Competition Agency Confidentiality Practices, April 2014, 10.

3.4.1 Substantive versus procedural approach

The criteria according to which information is qualified as confidential are either of a procedural or a substantive nature. The procedural approach looks at information based on the way it was obtained to determine its status. This way of defining the concept does not necessarily correlate with the actual sensitivity of the information gathered, but allows for easier classification.¹²⁵⁰ This could be information obtained by the agency in the course of the performance of its official duties and functions (a cartel or merger investigation for instance), obtained during non-public procedures, or obtained by other agencies.¹²⁵¹ Within a single jurisdiction, a distinction is often made between information submitted to an agency voluntarily, or information collected via compulsory means. Members of BIAC (the Business and Industry Advisory Committee to the OECD) and ICC (International Chamber of Commerce) believe that there should not be a generalised distinction based on whether information was submitted voluntarily or by compulsory means. They claim that the assumption that information provided voluntarily is commercially less sensitive will discourage companies from providing such information in the future.¹²⁵² Indeed, material that a party is forced to produce sometimes enjoys more stringent protection. However, in the context of the Damages Directive for instance, or in the EU-Switzerland Agreement, it is voluntarily submitted leniency information that is offered greater protection.¹²⁵³

Information can also be labelled confidential by the purpose for which the information was collected or submitted. Finally, some agencies claim that any information that the source has defined as confidential should be treated as such. This method is of course vulnerable to abuse.¹²⁵⁴ While business can often indicate what parts of the information they submitted to a competition agency should in their view be considered confidential, they often do not and should not have the last say in this, for the reasons mentioned earlier.

An alternative is to qualify information according to its nature and type. Harm (to commercial interests or competitive advantage) and secrecy are oft-cited factors in determining whether information is confidential. Within this category some variation applies. It could be limited to business secrets, trade secrets, commercial secrets, or more broadly encompass any information which is prejudicial to the commercial position of the subject, personal data, the source of information, or simply internal non-public documents and correspondence. The OECD Procedural Fairness and Transparency Report revealed that business secrets, trade secrets, and personal information are most commonly classified as confidential by competition agencies.¹²⁵⁵ The OECD itself defined confidential information in the context of international competition law enforcement as “*non-public business information the disclosure of which could prejudice the legitimate commercial interests of an*

¹²⁵⁰ B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 121.

¹²⁵¹ N. Ormonov, “Exchange of Information in the Enforcement of Antitrust Laws”, *Asper Review of International Business & Trade Law*, Vol. 6, 2006, 347.

¹²⁵² BIAC/ICC, “Questions from business regarding the protection of confidential information in the context of international antitrust cooperation”, prepared by the Business and Industry Advisory Committee to the OECD (BIAC) jointly with the ICC Commission on Law and Practices relating to competition, 23 October 2000.

¹²⁵³ International Competition Policy Advisory Committee Antitrust Division, ICPAC Final Report, 2000, available at <http://www.library.unt.edu/gpo/ICPAC/finalreport.htm> (accessed September 2015), Chapter 4, Footnote 91.

¹²⁵⁴ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 87.

¹²⁵⁵ ICN, Agency Effectiveness Project on Investigative Process – Competition Agency Confidentiality Practices, April 2014, 6, 13-14.

enterprise.”¹²⁵⁶ In the US, typical categories of confidential information include trade secrets, privileged information, financial information, the existence of law enforcement investigations, and information about individuals.¹²⁵⁷ Some agencies take their own and the public interest into consideration, apart from potential commercial damage to companies, by taking into account whether disclosure of certain information would affect future supply of information or would jeopardize an investigation.¹²⁵⁸ More concretely this could include information on prices, sales volumes, costs, productions statistics, internal business strategies, financial data, terms of contracts or contract negotiations, information about new products or projects, proprietary information, profits, commercial strategies, customers, or suppliers.¹²⁵⁹

3.4.2 The EU’s obligation of professional secrecy: a transparent and consistent approach?

3.4.2.1 Professional secrecy

As mentioned, Article 339 TFEU contains the basic duty of professional secrecy for members of EU institutions and bodies, which is further elaborated upon in Article 28 of regulation 1/2003 and Article 17 of regulation 139/2004 (see above, Part II, 3.2.1.1).¹²⁶⁰ None of these rules, however, contain a definition of the type of information covered by this obligation.¹²⁶¹ Without further elucidation, the concept appears wide enough to cover all information obtained by Commission officials in the course of their duties, even informally, except for information that was already in the public domain.¹²⁶²

The meaning of Article 339 TFEU (former Article 214 EEC Treaty) was first clarified in the notorious case of *Adams v. Commission*.¹²⁶³ Apart from indicating the dramatic consequences that wrongful disclosure of confidential information and breach of the obligation of professional secrecy (in the judgement mention is made of a ‘duty of confidentiality’) can entail, the judgment stated that

¹²⁵⁶ OECD, Recommendation of the OECD Council Concerning International Co-operation on Competition Investigations and Proceedings, C(2014)108, 16 September 2014.

¹²⁵⁷ OECD, Discussion on how to define confidential information, Contribution of the United States, DAF/COMP/WP3/WD(2013)55, 29 October 2013, 3.

¹²⁵⁸ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 87.

¹²⁵⁹ ICN, Agency Effectiveness Project on Investigative Process – Competition Agency Confidentiality Practices, April 2014, 13-14.

¹²⁶⁰ In *Pergan Hilfsstoffe* the court stated that Articles 20 and 21(2) of former Regulation no 17 were just the expression in secondary legislation of the obligation of professional secrecy contained in former Article 287 EC. Judgment of 12 October 2007, *Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission*, T-474/04, EU:T:2007:306, paragraph 62.

¹²⁶¹ More specifically, information gathered according to these regulations should only be used for antitrust enforcement by the European Commission in that specific case. (Article 28(1) Regulation 1/2003 and Article 17(1) Regulation 139/2004.) This restriction is further enforced by the second paragraph of both articles, prescribing that “*The Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy.*” The obligation also applies “*to all representatives and experts of Member States attending meetings of the Advisory Committee pursuant to Article 14*”. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003; Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29.1.2004.

¹²⁶² T. K. Giannakopoulos, *Safeguarding companies’ rights in competition and anti-dumping/anti-subsidies proceedings*, 2nd ed., Alphen aan den Rijn, Kluwer Law International, 192-193.

¹²⁶³ Judgment of 7 November 1985, *Stanley George Adams v Commission of the European Communities*, 145/83, EU:C:1985:448. The Commission was held to compensate the applicant for the damage suffered by the breach of confidentiality.

although former provision 214 EEC primarily referred to information gathered from undertakings, it nevertheless constitutes a general principle that also applies to information supplied by natural persons to protect the identity of an informant. It further clarified that this is ‘particularly so’ when information is provided voluntarily and accompanied by a request for anonymity. No criteria were given by the Court, however, to assess the legitimacy of this claim for confidentiality.¹²⁶⁴ In practice the Commission uses what it refers to as ‘the grid’, which is a matrix of regular confidentiality claims of companies and the Commission’s response, to determine whether a particular confidentiality claim is grounded or not. In the case *Postbank v. Commission*, it was further clarified that information covered by professional secrecy could cover both business secrets and other confidential information (see below, Part II, 3.4.2).¹²⁶⁵ This was later repeated in the *Pergan Hilfsstoffe* case and consolidated in secondary EU legislation.¹²⁶⁶

Confusion exists in the literature about what the notion of ‘confidential information’, or ‘professional secrecy’ entails. The General Court and the Court of Justice refer to an ‘obligation’ of professional secrecy.¹²⁶⁷ The term ‘professional secrecy’ is therefore used when referring to the obligation of the authorities, while the concepts of ‘business secrets’ and ‘other confidential information’ denote the subject of protection.¹²⁶⁸

State aid is often excluded from the scope of cooperation agreements, and is therefore less relevant in the context of exchange of confidential information with foreign competition authorities. The obligation of professional secrecy nevertheless applies.¹²⁶⁹ A special Commission communication on professional secrecy in state aid decisions explains how the Commission intends to handle requests from addressees of State aid decisions to not disclose parts of such decisions.¹²⁷⁰ It states in particular that “[t]here is no reason why the notions of business secret and other confidential information should be interpreted

¹²⁶⁴ Ibid., paragraph 34, 44 & 53.

¹²⁶⁵ Judgment of 18 September 1996, *Postbank NV v Commission of the European Communities*, T-353/94, EU:T:1996:119, paragraph 86; Judgment of 24 June 1986, *AKZO Chemie BV and AKZO Chemie UK Ltd v Commission of the European Communities*, C-53/85, EU:C:1986:256, paragraph 27-28; Judgment of 30 May 2006, *Bank Austria Creditanstalt AG v Commission of the European Communities*, T-198/03, EU:T:2006:136, paragraph 29.

¹²⁶⁶ “The Court would point out, next, that neither Article 287 EC nor Regulation No 17 state explicitly what information, apart from business secrets, is covered by the obligation of professional secrecy. It is apparent, however, from the open wording of Article 287 EC [...] from Article 13 (1) of Regulation No 2842/98 and from the case-law, that the concept of ‘information covered by the obligation of professional secrecy’ also includes confidential information other than business secrets.” Judgment of 12 October 2007, *Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission*, T-474/04, EU:T:2007:306, paragraph 62-64. See, for instance, the Commission Notice on cooperation within the Network of Competition Authorities, which clarifies that the term ‘professional secrecy’ referred to in Article 28 of Regulation 1/2003 is an EU law concept that includes in particular business secrets and other confidential information. (Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.04.2004.)

¹²⁶⁷ See for instance Judgment of 24 June 1986, *AKZO Chemie BV and AKZO Chemie UK Ltd v Commission of the European Communities*, C-53/85, EU:C:1986:256, paragraph 27. In *Pergan Hilfsstoffe* however, the Court referred to ‘the protection of professional secrecy’ (Judgment of 12 October 2007, *Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission*, T-474/04, EU:T:2007:306, paragraph 80).

¹²⁶⁸ The term ‘professional secrecy’ is used in Article 339 TFEU, Regulation 1/2003 and Regulation 139/2004, while the concepts of ‘business secret’ and ‘other confidential information’ are also used in Regulation 773/2004 and the Commission Notice on Access to the File.

¹²⁶⁹ Article 30 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015, (replacing Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83, 27.3.1999).

¹²⁷⁰ Commission Communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions, OJ C 297, 09.12.2003.

differently from the meaning given to these terms in the context of antitrust and merger procedures. The fact that in antitrust and merger procedures the addressees of the Commission decision are undertakings, while in State aid procedures the addressees are Member States, does not constitute an obstacle to a uniform approach as to the identification of what can constitute business secrets or other confidential information.”¹²⁷¹ As will become clear below, however, some differences remain. The Commission further listed the types of information that are generally not covered by the obligation of professional secrecy. Such information, also relevant in the context of cartel and merger cases, includes: “(a) information which is publicly available, including information available only upon payment through specialised information services or information which is common knowledge among specialists in the field [...]. The fact that information is not publicly available does not necessarily mean that the information can be regarded as a business secret; (b) historical information, in particular information at least five years old; (c) statistical or aggregate information; (d) [specific to the state aid context]”¹²⁷² While this list is non-exhaustive it is a welcome clarification. When information is considered as ‘public’ is not entirely clear, however, and can be subject to discussion. For instance, should information that was shared by a company with direct competitors, for instance, ever be qualified as confidential?¹²⁷³

3.4.2.2 Business secrets

The first category of information that is protected by the obligation of professional secrecy are business secrets. The Court in *Akzo Chemie* clarified that “business secrets are information of which not only disclosure to the public but also mere transmission to a person other than the one that provided the information may seriously harm the latter’s interest.”¹²⁷⁴ This was confirmed in later case-law.¹²⁷⁵ Business secrets are defined in the notice on access to file somewhat more broadly as information about the business activity of an undertaking, the disclosure of which could result in serious harm to that undertaking. As mentioned, if information is already known outside the undertaking concerned (or group or association to which it has been communicated by that undertaking), or if the information has lost its commercial importance, for instance because it is dated, it will generally not be considered confidential.¹²⁷⁶

Even though the Commission communication on professional secrecy in state aid decisions stated that the concept of business secrets should not be interpreted differently than in cartel or merger cases, the communication defines business secrets as information that relates to a business with actual or potential economic value, that, when disclosed or used, could result in economic benefits for other companies. The definition does not mention damage to the undertaking itself. The fact that disclosure of certain information might harm the company is not sufficient to prove that this

¹²⁷¹ Ibid., 9.

¹²⁷² Ibid., 14.

¹²⁷³ Unless it concerns information related to Research & Development, ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 24.

¹²⁷⁴ Judgment of 24 June 1986, *AKZO Chemie BV and AKZO Chemie UK Ltd v Commission of the European Communities*, C-53/85, EU:C:1986:256, paragraph 28-29, as mentioned in Judgment of 18 September 1996, *Postbank NV v Commission of the European Communities*, T-353/94, EU:T:1996:119, paragraph 87.

¹²⁷⁵ Judgment of 30 May 2006, *Bank Austria Creditanstalt AG v Commission of the European Communities*, T-198/03, EU:T:2006:136, paragraph 30.

¹²⁷⁶ “As a general rule, the Commission presumes that information pertaining to the parties’ turnover, sales, market-share data and similar information which is more than 5 years old is no longer confidential.” OECD, Discussion on how to define confidential information, Contribution of the European Union, DAF/COMP/WP3/WD(2013)57, 29 October 2013, 5.

information constitutes a business secret.¹²⁷⁷ The Commission enumerates a non-exhaustive list of criteria that it uses to determine whether certain information is a business secret or not, or, in other words, to determine whether the information could result in economic benefits and thus has actual or potential economic value. The list includes: “(a) *the extent to which the information is known outside the company*; (b) *the extent to which measures have been taken to protect the information within the company, for example, through non-compete clauses or non-disclosure agreements imposed on employees or agents, etc*; (c) *the value of the information for the company and its competitors*; (d) *the effort or investment which the undertaking had to undertake to acquire the information*; (e) *the effort which others would need to undertake to acquire or copy the information*; (f) *the degree of protection offered to such information under the legislation of the Member State concerned.*”¹²⁷⁸ Factors both inherent to and independent from the company are therefore taken into account.

The 2003 communication on professional secrecy in state aid decisions, released under Commissioner MONTI, and the 2005 notice on access to file, under Commissioner KROES, therefore contain different definitions of what constitutes a business secret. While the former defines business secrets in a negative way, as information whose disclosure could cause serious harm to the undertaking concerned, the latter employs a positive perspective by defining business secrets according to the economic value of the information and the economic benefits that it could bring to competitors. The difference is nevertheless not very problematic. While the way business secrets are defined differs greatly, the examples given do align to a very large extent, mentioning technical and/or financial information relating to an undertaking's know-how, cost-assessment methods, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure, sales policy, and information on the internal organisation of the undertaking.¹²⁷⁹

In the *Bank Austria Creditanstalt* case the purpose of the distinction between business secrets and other information falling under the obligation of professional secrecy was clarified. The General Court stated that both categories of information are attributed different levels of protection. More precisely, while information covered by the obligation of professional secrecy may not be disclosed to the general public, when it concerns ‘other confidential information’ it may be disclosed to those having a right to be heard in the context of proceedings applying the competition rules, to the extent necessary to do so for the proper conduct of the investigation. This possibility does not exist with regard to business secrets, which are afforded ‘very special protection’,¹²⁸⁰ in that third parties may never be given access unless the Commission or EU Courts decide that the rights of defence and the public interest in the administration of justice outweigh the protection of business secrets.¹²⁸¹

3.4.2.3 Other confidential information

¹²⁷⁷ Commission Communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions, *OJ C* 297, 09.12.2003, 10-12.

¹²⁷⁸ *Ibid.*, 13.

¹²⁷⁹ Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, *OJ C* 325, 22.12.2005, 18; Commission Communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions, *OJ C* 297, 09.12.2003, 10.

¹²⁸⁰ Judgment of 30 May 2006, *Bank Austria Creditanstalt AG v Commission of the European Communities*, T-198/03, EU:T:2006:136, paragraph 29. Also see I. van Bael, *Due Process in Competition Proceedings*, Alphen aan den Rijn, Wolters Kluwer, 2011, 181.

¹²⁸¹ E. Beumer, “The colorful spectrum of fundamental rights in EU competition law procedures: overcompensation or undercompensation of fundamental rights protection? A case study on the right to be heard”, paper prepared for the 9th ASCOLA Conference on procedural fairness in competition proceedings, Warsaw, 26-28 June 2014, 18.

The second type of information that is protected by the obligation of professional secrecy is ‘other confidential information’. The Court in *Bank Austria Creditanstalt* recognized that what exactly is covered by the obligation of professional secrecy apart from business secrets is not clarified by EU law, and therefore established the factors that should be fulfilled if information is to be qualified as deserving the protection offered by the obligation of professional secrecy.¹²⁸² In this case, the Court had to pronounce itself on an application for the annulment of a decision of the Commission’s Hearing Officer to publish the non-confidential version of a Commission decision in case *Austrian banks (Lombard Club)* in the Official Journal and on the Commission’s website.¹²⁸³ The Court first referred to the aim of the provisions on professional secrecy in the context of a competition proceeding, which is to protect persons concerned by these proceedings from the harm potentially resulting from the disclosure of information obtained by the Commission in the course of such proceedings.¹²⁸⁴ A first condition is that the information may only be known to a limited number of persons. It is not explicitly required that the person claiming protection must have taken steps to keep the information secret, contrary to what is stated for business secrets. Second, disclosure of the information must be liable to cause serious harm to the person who has provided it or to third parties. Finally, the interests that might be harmed via the disclosure, must be ‘worthy of protection’ in an objective manner.¹²⁸⁵ According to the Court this implies a balancing of the legitimate interests opposing disclosure and the public interest that the activities of the EU institutions occur openly.¹²⁸⁶

These factors were later applied in the *Pergan Hilfsstoffe* case.¹²⁸⁷ In the proceedings anticipating this judgment, the hearing officer specifically stated that “*the risk [of actions for damages under national law] does not in itself cause serious and unjust harm to the applicant’s interests such as to justify protection of the disputed information. In the event that they are well-founded, actions for damages before national courts are in fact the acceptable consequence of committing an infringement of Community and national competition law.*”¹²⁸⁸ It was confirmed by the Court that interests in avoiding paying damages are not objectively worthy of protection. A ‘smoking gun’ document found somewhere in the kitchen cupboards of a CEO not containing any commercially sensitive information, should therefore not be subject to the same disclosure restrictions as the secret recipe for Coca Cola.¹²⁸⁹ The former type of information will indeed also seriously harm the companies’ competitiveness if disclosed, but this is not an interest

¹²⁸² Judgment of 30 May 2006, *Bank Austria Creditanstalt AG v Commission of the European Communities*, T-198/03, EU:T:2006:136.

¹²⁸³ Commission Decision relating to a proceeding under Article 81 of the EC Treaty, Case COMP/36.571/D-1: *Austrian banks — ‘Lombard Club’*, 11 June 2002.

¹²⁸⁴ Judgment of 30 May 2006, *Bank Austria Creditanstalt AG v Commission of the European Communities*, T-198/03, EU:T:2006:136, paragraph 42.

¹²⁸⁵ This is a fairly universal approach, as reflected in the responses of the Japanese during the OECD discussion on how to define confidential information. The JFTC clarified that while all national public servants are under a general obligation of confidentiality, there is a specific obligation of confidentiality placed on staff members of the JFTC. In this context, the term ‘the secrets of enterprises’ covers information that contains “(1) non-public facts, (2) which are hoped to be kept secret by the enterprises and (3) for which there is an objective rational [sic] to keep them secret.” This definition differs from the general term ‘secret’, which is “any non-public fact which is found to be valuable essentially to be kept secret.” (OECD, Discussion on how to define confidential information, Contribution from Japan, DAF/COMP/WP3/WD(2013)40, 29 October 2013, 2-3)

¹²⁸⁶ Judgment of 30 May 2006, *Bank Austria Creditanstalt AG v Commission of the European Communities*, T-198/03, EU:T:2006:136, paragraph 71.

¹²⁸⁷ Judgment of 12 October 2007, *Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission*, T-474/04, EU:T:2007:306, paragraph 65.

¹²⁸⁸ *Ibid.*, paragraph 21.

¹²⁸⁹ *Ibid.*, paragraph 21, 72.

objectively worthy of protection. In *CDC Hydrogen Peroxide*, a case relating to access to the Commission file on the basis of Regulation 1049/2001,¹²⁹⁰ the General Court confirmed that the exception of the protection of commercial interests could not be relied upon because the interest of a cartel-participant to avoid damages actions is not a commercial interest and in any case does not constitute an interest deserving of protection.¹²⁹¹ More recently the General Court again unequivocally stated that the interest of an undertaking that has breached competition law in non-disclosure to the public of details of the offending conduct does not merit protection.¹²⁹²

It is relevant in this regard that the information needed in cartel cases differs from the information sought in order to review a pending merger. In a cartel case competition authorities will look for evidence of meetings or certain communications between competitors on for instance pricing, or markets, or sales volumes. This type of data is most likely to be found in for instance handwritten notes, agenda's or calendars, and phone logs. This is different from the information that is needed to assess a merger, where commercially sensitive details on the structure and figures of a company are pursued, such as business plans and strategies, market share information, data on sales and production costs, technical characteristics of a product, information on customers and suppliers, or financial data.¹²⁹³ A study undertaken by the OECD confirmed that documents often needed in merger cases such as trade secrets or business plans are far more commercially sensitive than much of the evidence needed to prove a conspiracy, such as travel or telephone records.¹²⁹⁴ This was also confirmed by senior antitrust division officials in the context of the ICPAC report.¹²⁹⁵ Nevertheless, this information is often subject to the same confidentiality protection.

In Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to [former] articles 81 and 82 of the EC Treaty, it is further clarified that the category of 'other confidential information' includes information that does not constitute a business secret, but its disclosure would significantly harm an undertaking or person and it therefore deserves to be confidential.¹²⁹⁶ The same definition is found in the notice on access to file.¹²⁹⁷ The notice further adds that "[d]epending on the specific circumstances of each case, this may apply to information provided by third

¹²⁹⁰ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *OJ L* 145, 31.5.2001, 43–48.

¹²⁹¹ Judgment of 15 December 2011, *CDC Hydrogene Peroxide Cartel Damage Claims (CDC Hydrogene Peroxide) v European Commission*, T-437/08, EU:T:2011:752, paragraph 49.

¹²⁹² Judgment of 28 January 2015, *Akzo Nobel NV and Others v European Commission*, T-345/12, EU:T:2015:50, paragraph 80.

¹²⁹³ S. Hammond, "Beating cartels at their own game – sharing information in the fight against cartels", presented at the Inaugural Symposium of the Competition Policy Research Center - Fair Trade Commission of Japan, Tokyo, 20 November 2003, 6; L. Laudati, *Study of exchange of confidential information agreements and treaties between the US and Member States of the EU in areas of securities, criminal, tax and customs*, Luxemburg, Office for Official Publications of the European Communities, 1996, 11-12; B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 121.

¹²⁹⁴ OECD Reports, Global Forum on Competition, 'Preventing Market abuses and promoting economic efficiency, growth and opportunity', 2004, <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/27892500.pdf> (accessed March 2017), 68.

¹²⁹⁵ International Competition Policy Advisory Committee Antitrust Division, ICPAC Final Report, 2000, available at <http://www.library.unt.edu/gpo/ICPAC/finalreport.htm> (accessed September 2015), Chapter 4.

¹²⁹⁶ Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, *OJ L* 123, 27.4.2004, recital 13.

¹²⁹⁷ Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, *OJ C* 325, 22.12.2005, 19.

parties about undertakings which are able to place very considerable economic or commercial pressure on their competitors or on their trading partners, customers or suppliers. [...] Therefore the notion of other confidential information may include information that would enable the parties to identify complainants or other third parties where those have a justified wish to remain anonymous.¹²⁹⁸ This category also covers military secrets.¹²⁹⁹ The communication on professional secrecy in state aid decisions adds that in state aid cases in particular there could be other forms of confidential information that refer specifically to state-secrets or other confidential information having to do with the organisational activity of a state.¹³⁰⁰

As mentioned above, business secrets in the EU are defined as information about an undertaking's business activity that, when disclosed, could result in a serious harm to *the same* undertaking. Other confidential information includes information other than business secrets, the disclosure of which would significantly harm a person or undertaking. What the difference would be between serious or significant harm is not clear. In *Bank Austria* the Court pointed to the distinction that should be made between the protection of information in the context of the right to be heard in competition procedures, and protection from the general public. In the context of proceedings certain information that is not a business secret (enjoying absolute protection), can be disclosed to persons having the right to be heard, for the proper conduct of the investigation.¹³⁰¹

3.4.2.4 Third category 'of the kind'?

Both the wording of Article 339 TFEU and the abovementioned case-law indicate that professional secrecy covers two types of information: business secrets and 'other confidential information'. What is confusing, however, is that in both the *Bank Austria* and *Pergan Hilfsstoffe* cases mentioned above, the Court stated that the Hearing Officer should not only analyse whether a decision intended for publication contains business secrets or other confidential information, but also other information that cannot be disclosed to the public either on the basis of rules of EU law affording such information 'specific protection' or because it is information 'of the kind covered by the obligation of professional secrecy'.¹³⁰² It is stated that "*the confidentiality of information, for which professional secrecy requires that it be protected under Article 287 EC, may also stem from other provisions of primary or secondary Community law [...]*".¹³⁰³ It appears therefore that a third category of information exists, which is not a business secret or 'other confidential information', but information 'of the kind' covered by the obligation of professional secrecy. Examples of such protection via secondary legislation were given in the form of Article 4 of Regulation No 1049/2001 (access to documents) and Regulation (EC) No 45/2001 (personal data, now Regulation 2016/679).¹³⁰⁴ It should be noted in this context however that legal persons do not belong to the scope, *ratione personae*, of the latter regulation.

¹²⁹⁸ Ibid.

¹²⁹⁹ Ibid., 20.

¹³⁰⁰ Commission Communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions, OJ C 297, 09.12.2003, 17.

¹³⁰¹ Judgment of 30 May 2006, *Bank Austria Creditanstalt AG v Commission of the European Communities*, T-198/03, EU:T:2006:136, paragraph 29.

¹³⁰² Ibid., paragraph 34; Judgment of 12 October 2007, *Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission*, T-474/04, EU:T:2007:306, paragraph 66.

¹³⁰³ Judgment of 30 May 2006, *Bank Austria Creditanstalt AG v Commission of the European Communities*, T-198/03, EU:T:2006:136, paragraph 34-35; Judgment of 12 October 2007, *Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission*, T-474/04, EU:T:2007:306, paragraph 64.

¹³⁰⁴ Judgment of 30 May 2006, *Bank Austria Creditanstalt AG v Commission of the European Communities*, T-198/03, EU:T:2006:136, paragraph 74-75.

This category could cover for instance internal EU institution documents, as such documents are sometimes granted ‘specific protection’ via secondary legislation in the context of access to the file. Regulation 773/2004 mentions that internal documents are not to be disclosed, but do not belong to either the category of business secrets or other confidential information.¹³⁰⁵ The Notice on Access to the File clarified that access can be granted to all documents making up the ‘file’ as kept by DG Competition and its case handlers. An exception is made for an exhaustive list of ‘non-accessible’ documents.¹³⁰⁶ These documents can be categorised as either documents containing business secrets and other confidential information on the one hand, and the Commission’s or the Member State competition authorities’ internal documents on the other hand,¹³⁰⁷ in particular correspondence between the Commission and the NCAs or between the latter, or other correspondence with other public authorities from both member and non-member countries, in particular where there is an international agreement in place governing the confidentiality of the information exchanged, where such correspondence is contained in the file.¹³⁰⁸ This was established in the Commission’s XIIth Report on Competition Policy of 1982 and was taken over in Regulation 1/2003.¹³⁰⁹ Article 28 of regulation 1/2003 mentions that information acquired by the Commission, its officials and other servants as a result of the application of the regulation, and information of the kind covered by the obligation of professional secrecy, shall not be disclosed.¹³¹⁰ This again indicates that information acquired according to the Commissions powers of investigation, and information covered by the obligation of professional secrecy, are not the same.

Originally there was some confusion regarding the types of documents protected as being ‘internal documents’, but this was clarified by the Notice on Access to the File. Non-incriminatory or non-exculpatory documents such as drafts, opinions, memos, or notes do not constitute part of the evidence on which the Commission can rely in its assessment of a case and therefore a restriction on access to internal documents does not prejudice the proper exercise of the parties’ right of defence. While the Commission it not obliged to do so, it may choose to draft minutes of meetings with any person or undertaking. As such, they constitute the Commission’s interpretation of the meetings, and are therefore classified as internal documents. However, if the person or undertaking in question has agreed the minutes, a non-confidential version of the latter will be made accessible as they do constitute part of the evidence.¹³¹¹ Internal documents thus enjoy to a certain extent the same protection as information falling under the obligation of professional secrecy (no access), but cannot be qualified as ‘other confidential information’ as they would not always fall under the definition.

3.4.3 A balancing of interests

¹³⁰⁵ Article 15(2) Regulation 773/2004: “*The right of access to the file shall not extend to business secrets, other confidential information and internal documents of the Commission or of the competition authorities of the Member States.*” [emphasis by auhtor]

¹³⁰⁶ As clarified in the *Hercules* case law. Judgment of 17 December 1991, *SA Hercules Chemicals NV v Commission of the European Communities*, T-7/89, EU:T:1991:75; Judgment of 8 July 1999, *Hercules Chemicals NV v Commission of the European Communities*, C-51/92 P, EU:C:1999:357.

¹³⁰⁷ I. van Bael, *Due Process in Competition Proceedings*, Alphen aan den Rijn, Wolters Kluwer, 2011, 178.

¹³⁰⁸ T. K. Giannakopoulos, *Safeguarding companies’ rights in competition and anti-dumping/anti-subsidies proceedings*, 2nd ed., Alphen aan den Rijn, Kluwer Law International, 175-176, 189-190.

¹³⁰⁹ Article 27(2) Regulation 1/2003. See T. K. Giannakopoulos, *Safeguarding companies’ rights in competition and anti-dumping/anti-subsidies proceedings*, 2nd ed., Alphen aan den Rijn, Kluwer Law International, 187.

¹³¹⁰ Judgment of 30 May 2006, *Bank Austria Creditanstalt AG v Commission of the European Communities*, T-198/03, EU:T:2006:136, paragraph 2.

¹³¹¹ T. K. Giannakopoulos, *Safeguarding companies’ rights in competition and anti-dumping/anti-subsidies proceedings*, 2nd ed., Alphen aan den Rijn, Kluwer Law International, 188-189.

The expansion of confidentiality legislation and legislation regarding access to documents can be compared to a tree, with interwoven branches and leaves, which renders the view opaque and the branches difficult to untangle.¹³¹² To evaluate the legitimacy of a confidentiality claim it is necessary to identify the interests protected and whether such protection is warranted.¹³¹³ There is a systemic tension between the general objective of informing the public about government activities and the confidentiality rules that specifically apply to information obtained by competition agencies during their investigations.¹³¹⁴ In *Pergan Hilfsstoffe* the Court stated that the concept of professional secrecy should be interpreted in the light of the general principles and fundamental rights that are a constituent element of the EU legal order.¹³¹⁵ One way to shed some light on the interplay between the EU principle of open decision-making and the basic obligation of professional secrecy is to deconstruct the matter based on the different underlying fundamental rights that are implicitly being weighed. Disclosure is supported by the essential values of the EU that are transparency and openness, translated inter alia via the right of access to information. This should be weighed against the right of companies to see their confidential information protected so as not to incur (financial and reputational) damage. Such a right could in turn find grounds in the fundamental right against self-incrimination, the right to private life, and the right to have personal data protected. A careful balancing exercise is in order.

3.4.3.1 The principles of openness and transparency

The right of public access to EU documents is governed by the institutional and procedural principles of transparency and openness. Open decision-making is a fundamental element of the EU legal order that was enshrined in primary EU law by the Treaty of Amsterdam, and is now reflected in Articles 1 TEU and 15 TFEU. The principle of openness functions as an ‘umbrella’ term covering both the principle of transparency and the principle of participation. It is further elaborated upon in Article 10 (3) TEU, linking the concept to that of ‘representative democracy’, and Article 11(2) TEU, which is aimed at the institutions.¹³¹⁶ The principle evolved from a prerequisite for the functioning of the Union to a right of its citizens. This has had an impact on its scope, which originally extended across the administration. Indeed, initially the principle of access to information was mainly an institutional challenge of the Union, requiring that institutions have the same amount of information when performing their duties, while it has now become a right of the individual. Article 298 TFEU conferred on the Union’s legislature the power to establish provisions to create an open, efficient and independent European administration.¹³¹⁷ In *Kingdom of Sweden and Turco v Council*, the Court “put the debate on transparency squarely in the camp of legitimacy and democracy.”¹³¹⁸ This respect for ‘democratic

¹³¹² My gratitude goes out to PHILIP MARSDEN for coming up with this metaphor.

¹³¹³ M. Chowdhury, “From paper promises to concrete commitments: Dismantling the obstacles to transatlantic cooperation in cartel enforcement”, AAI Working Paper No. 11-09, November 28, 2011, 13.

¹³¹⁴ ICN, Agency Effectiveness Project on Investigative Process – Competition Agency Confidentiality Practices, April 2014, 15.

¹³¹⁵ Judgment of 12 October 2007, *Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission*, T-474/04, EU:T:2007:306, paragraph 75.

¹³¹⁶ European Parliament, Directorate-General for Internal Policies, Policy Department C - Citizen’s rights and constitutional affairs, Justice, Freedom and Security, Openness, transparency and access to documents and information in the EU, PE 493.035, November 2013, 8.

¹³¹⁷ Ibid., 8-12.

¹³¹⁸ Ibid., 9; Judgment of 1 July 2008, *Kingdom of Sweden and Maurizio Turco v Council of the European Union*, Joined cases C-39/05 P and C-52/05 P, EU:C:2008:374, paragraph 59. Earlier, Advocate General TESAURO had claimed that effective and efficient supervision, also at the level of public opinion, of the operations of the governing organization as well as genuinely participatory organizational models to evolve as regards relations between the administration and the

principles’, also integrated in the Treaty under Title II TEU, exerted new pressure on the institutions regarding access to information and documents. Rather than an abstract judgment call, the principle of openness evolved towards a ‘testable’ condition for the democratic legitimacy of the rules of the EU.¹³¹⁹ It was stated in *Kingdom of Sweden v Commission* that the effective exercise of democratic rights was meaningless without the possibility for citizens to understand the considerations underpinning legislative action.¹³²⁰ The principle of openness therefore also encompasses disclosure in view of respecting a party’s rights of defence.

The right to access to documents indeed follows from the notion of equality of arms and the right to an adversarial procedure, implying that parties should have knowledge of all evidence or observations filed and be afforded a reasonable opportunity to present the case under more or less equal conditions as the opponent. It is not explicitly included in article 6 of the European Convention on Human Rights (ECHR). Parties only have a limited right to access documents. The European Court for Human Rights (ECtHR) confirmed that in civil procedures parties can only obtain disclosure of documents that can actually influence the judgment of the court. If documents have not been presented to the court, they must not be shared with the opposing party either. The right to have access to documents in possession of a court or administrative authority, which can influence the outcome of the case, is not absolute. However, a restriction on this right is only permitted when it is strictly necessary and the difficulties caused to the defence are sufficiently counterbalanced by the procedures followed by the judicial authorities.¹³²¹ The right to access and receive information is sometimes called ‘passive freedom of information’ and in this sense falls under article 10 of the ECHR on freedom of expression. The Article is primarily directed against interferences by the State and offers every person the right to try seeking information without being negatively impacted by the State. The State has to organize its information system in such a way that everyone can inform him- or herself about important questions. The right to receive information, however, is limited to publicly accessible information, Article 10 does not require that the State makes confidential information available to the public.¹³²²

The more specific ‘right of access to documents’ for third parties is now enshrined in the Charter of Fundamental Rights under Article 42. The right is given to both natural and legal persons. Advocate General MADURO underlined that “[s]ince the right of access to documents of the institutions has become a fundamental right of constitutional import linked to the principles of democracy and openness, any piece of secondary legislation regulating the exercise of that right must be interpreted by reference to it, and limits placed on it by that legislation must be interpreted even more restrictively.”¹³²³ Apart from this inclusion in the Charter, the Treaty

administered is only possible if the activities of the legislature, the executive and the public administration in general are appropriately public. Opinion of Advocate General Tesauro in *Kingdom of the Netherlands v Council of the European Union*, C-58/94, EU:C:1995:409, paragraph 14.

¹³¹⁹ European Parliament, Directorate-General for Internal Policies, Policy Department C - Citizen’s rights and constitutional affairs, Justice, Freedom and Security, Openness, transparency and access to documents and information in the EU, PE 493.035, November 2013, 9.

¹³²⁰ Ibid., 10; Opinion of Advocate General Maduro in *Kingdom of Sweden v European Commission*, C-64/05, EU:C:2007:433, paragraph 46.

¹³²¹ E. Beumer, “The colorful spectrum of fundamental rights in EU competition law procedures: overcompensation or undercompensation of fundamental rights protection? A case study on the right to be heard”, paper prepared for the 9th ASCOLA Conference on procedural fairness in competition proceedings, Warsaw, 26-28 June 2014, 13-14.

¹³²² C. Grabenwarter, *European Convention on Human Rights – Commentary*, Munich, Beck (in Gemeinschaft mit Hart Publishing, Oxford, Nomos Verlagsgesellschaft, Baden-Baden und Helbing & Lichtenhahn/Basel), 2014, 256.

¹³²³ Opinion of Advocate General Maduro in *Kingdom of Sweden v European Commission*, C-64/05, EU:C:2007:433, paragraphs 40-42.

of Lisbon introduced further changes by omitting the protection desired by Member States regarding the confidentiality of the Council's work in Article 207(3) TEC.¹³²⁴ The legislature does not, however, have full discretion to decide what the principles and conditions are that should govern this right, but should rather implement it in a way that EU citizens enjoy it.¹³²⁵ For the parties to the case, the right is included in Article 41 of the Charter relating to the right to good administration, which encompasses “*the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy.*”¹³²⁶

3.4.3.2 The underpinnings of the principle of professional secrecy

The CJEU has explicitly established that the protection of business secrets is a general principle of EU law.¹³²⁷ The concept that businesses have a *fundamental* right to the protection of their confidential business information, however, is not generally accepted.¹³²⁸ This question is raised in particular in the discussion on the existence of human rights for companies and the assimilation between legal persons and natural persons.¹³²⁹ Two such alleged rights can be discerned in the context of this study: the right against self-discrimination, and respect for private life, including the protection of personal data.

While commercial entities can rely on the ECHR, as long as they are not closely related to the State,¹³³⁰ the case law of the ECtHR suggests that the protection afforded to such entities must be framed in such a way as to avoid irretrievably hampering the effectiveness of the regulatory structures in which they operate.¹³³¹ In this context, the ECtHR opined that “*the Convention would allow for a somehow more ‘lenient’ approach to be applied in respect to the protection of rights enjoyed by commercial entities.*”¹³³² Some rights can never be available to legal entities due to their nature, such as, for

¹³²⁴ According to Article 15(3)(1) TFEU the right is “*subject to the principles and the conditions to be defined in accordance with this paragraph.*”

¹³²⁵ European Parliament, Directorate-General for Internal Policies, Policy Department C - Citizen's rights and constitutional affairs, Justice, Freedom and Security, Openness, transparency and access to documents and information in the EU, PE 493.035, November 2013, 11.

¹³²⁶ E. Beumer, “The colorful spectrum of fundamental rights in EU competition law procedures: overcompensation or undercompensation of fundamental rights protection? A case study on the right to be heard”, paper prepared for the 9th ASCOLA Conference on procedural fairness in competition proceedings, Warsaw, 26-28 June 2014, 17.

¹³²⁷ Judgement of 14 February 2008, *Varec SA v Belgian State*, C-450/06, EU:C:2008:91, paragraph 49; Judgment of 24 June 1986, *AKZO Chemie BV and AKZO Chemie UK Ltd v Commission of the European Communities*, C-53/85, EU:C:1986:256, paragraph 28; Judgment of 19 May 1994, *Samenwerkende Elektriciteits-Productiebedrijven (SEP) NV v Commission of the European Communities*, C-36/92 P, EU:C:1994:205, paragraph 37.

¹³²⁸ P. Van Nuffel, “Human rights and competition law: do undertakings have a ‘fundamental right’ of protection of confidential information?” in D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae Civis – Liber Amicorum Jacques Steenbergen*, Brussel, Larcier, 2014, 588.

¹³²⁹ For a discussion of this topic, see M. Emberland, *The human rights of companies – exploring the structure of ECHR protection*, New York, Oxford University Press, 2006.

¹³³⁰ For instance where a legal entity is exercising public authority. See Article 34 ECHR mentioning that the Court may receive applications from “*any person, non-governmental organization or group of individuals.*” Also see C. Grabenwarter, *European Convention on Human Rights – Commentary*, Munich, Beck (in Gemeinschaft mit Hart Publishing, Oxford, Nomos Verlagsgesellschaft, Baden-Baden und Helbing & Lichtenhahn/Basel), 2014, 3.

¹³³¹ A. Andreangeli, “Competition Law and Human Rights: Striking a Balance Between Business Freedom and Regulatory Intervention”, Edinburgh Research Explorer, 2009, http://www.research.ed.ac.uk/portal/files/14818433/Competition_Law_Human_Rights_Striking_a_Balance_Between_Business_Freedom_and_Regulatory_Intervention.pdf, (accessed February 2017), 5.

¹³³² See, for instance, *Beyeler v Italy*, App. No. 33202/96, 33 Eur. H.R. Rep 52 (2001), paragraph 109; *Lithgow v United Kingdom*, App. No. 9006/80, 7 Eur. H.R. Rep. 56, (1985), paragraph 110.

instance, the right to life, the prohibition of torture and inhuman or degrading treatment, or the prohibition of the death penalty.¹³³³ The EU courts have adopted a somewhat more generous approach than the ECtHR. According to VAN NUFFEL “[i]t is fair to say that whenever undertakings are caught by the competition rules, the legal persons responding for their behaviour also enjoy the protection of the applicable ‘human rights’.”¹³³⁴ Several guarantees enshrined in the ECHR as well as in the Charter have been extended to apply to legal persons involved in competition law proceedings.¹³³⁵

A) The right not to incriminate oneself

The broader debate surrounding the assimilation of companies to individuals regarding human rights in the context of competition law enforcement is particularly acute with regard to due process rights such as the right not to incriminate oneself. WILS explained for instance that the privilege against self-incrimination originated from the threat of physical pressure that could be imposed on natural persons, a threat not present with regard to companies.¹³³⁶ It is therefore open for debate whether the extension of human rights to corporations should be uncritical and complete, and whether in this manner the conception of due process protection in this area of law is not being overstretched. SANCHEZ GRAELLS and MARCOS claimed that while in a competition law context administrative law procedures should be sound and a strong system of judicial review should be in place, corporations should not have access to broader constitutional or human rights protections.¹³³⁷ JONES likewise disagreed with the alignment of natural and legal persons. According to him the human rights context is one example of an area in which both are not fully congruent, and the premise that legal persons and natural persons should have the same privilege against self-incrimination in the administrative context is flawed.¹³³⁸

Both the personal and material scope of the privilege against self-incrimination are subject to discussion. One of the reasons why the scope of this privilege is so controversial is because it touches upon the constituent elements of competition law. There is a clash between a natural person

¹³³³ C. Grabenwarter, *European Convention on Human Rights – Commentary*, Munich, Beck (in Gemeinschaft mit Hart Publishing, Oxford, Nomos Verlagsgesellschaft, Baden-Baden und Helbing & Lichtenhahn/Basel), 2014, 3.

¹³³⁴ P. Van Nuffel, “Human rights and competition law: do undertakings have a ‘fundamental right’ of protection of confidential information?” in D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae Civis – Liber Amicorum Jacques Steenbergen*, Brussel, Larcier, 2014, 581.

¹³³⁵ See, for example, Judgment of 26 June 1980, *National Panasonic (UK) Limited v Commission of the European Communities*, 136/79, EU:C:1980:169, paragraph 19-20; Opinion of Advocate General Lenz in *AKZO Chemie BV and AKZO Chemie UK Ltd v Commission of the European Communities*, 53/85, EU:C:1986:25, paragraph 25-27; Judgment of 17 December 1998, *Baustablgewebe GmbH v Commission of the European Communities*, C-185/95 P, EU:C:1998:608, paragraph 20-21; Judgment of 8 July 1999, *Montecatini SpA v Commission of the European Communities*, C-235/92 P, EU:C:1999:362, paragraph 175-176.

¹³³⁶ X., “Discussion report (CARS)” in P. Nihoul & T. Scoczyny (eds) *Procedural fairness in competition proceedings*, Cheltenham, Edward Elgar Publishing, 2015, 330.

¹³³⁷ See, for instance, A. Sanchez Graells and F. Marcos, “‘Human rights’ protection for corporate antitrust defendants: are we not going overboard?” in P. Nihoul & T. Scoczyny (eds), *Procedural Fairness in Competition Proceedings*, Cheltenham, Edward Elgar Publishing, 2015, abstract.

¹³³⁸ C. Jones, “Into the parallel universe: procedural fairness in private litigation after the Damages Directive”, 9th ASCOLA Conference Warsaw 2014 on Procedural Fairness in Competition Proceedings, Centre for Antitrust and Regulatory Studies, University of Warsaw, Warsaw, 26-28 June 2014, 21.

possessing a privilege against self-incrimination, and a legal regime that does not always target the natural persons who have acted on behalf of a legal person.¹³³⁹

The right against self-incrimination is not explicitly mentioned in the Charter of Fundamental Rights of the EU or the ECHR. Article 6 ECHR contains a list of additional rights that are applicable in criminal cases, but also here an explicit privilege against self-incrimination or a right to silence is lacking.¹³⁴⁰ Nevertheless, the right against self-incrimination has been considered to be a part of the right to a fair trial as enshrined in Article 6 of the Convention according to the ECtHR.¹³⁴¹

In the 1993 *Funke v France* case the ECtHR first recognised the privilege against self-incrimination, but did not elaborate on its scope, origins, or rationale.¹³⁴² In *John Murray v United Kingdom* a non-absolute right of silence was recognised.¹³⁴³ The privilege against self-incrimination was further elaborated upon in the controversial case of *Saunders v. United Kingdom*.¹³⁴⁴ Most importantly, this case clarified that the privilege relates only to the admission of the evidence in criminal proceedings, but does not prohibit the use of compulsory questioning powers in the course of a purely administrative investigation.¹³⁴⁵ Much ink has flown about the nature of competition law proceedings.¹³⁴⁶ Even though EU competition law proceedings are ‘administrative’, as they do not take place before courts, the ECtHR recognized that they can nevertheless be ‘criminal’ in nature, given their general applicability in the public interest and the deterrent and punitive nature of the potential sanctions.¹³⁴⁷ The Court did not accept the Government’s argument in this case that the complexity of corporate fraud and the vital public interest in the investigation and punishment of such fraud could justify a marked departure from one of the basic principles of a fair procedure.¹³⁴⁸ In the *O’Halloran and Francis* case it was confirmed finally that while the right to a fair trial was in itself absolute, its

¹³³⁹ C. Jones, “Into the parallel universe: procedural fairness in private litigation after the Damages Directive”, 9th ASCOLA Conference Warsaw 2014 on Procedural Fairness in Competition Proceedings, Centre for Antitrust and Regulatory Studies, University of Warsaw, Warsaw, 26-28 June 2014, 19.

¹³⁴⁰ A. Ashworth, “Self-incrimination in European Human Rights law – a pregnant pragmatism?”, *Cardozo Law Review*, Vol. 30, No. 3, 2008, 751.

¹³⁴¹ Found in Article 47 of the Charter and Article 6(1) of the European Convention on Human Rights. C. Jones, “Into the parallel universe: procedural fairness in private litigation after the Damages Directive”, 9th ASCOLA Conference Warsaw 2014 on Procedural Fairness in Competition Proceedings, Centre for Antitrust and Regulatory Studies, University of Warsaw, Warsaw, 26-28 June 2014, 11.

¹³⁴² *Funke v France*, App. No. 10828/84, 256 Eur. H.R. (ser. A) (1993).

¹³⁴³ *John Murray v United Kingdom*, App. No. 18731/91, 1996-I Eur. H.R. 30 (1996). While the privilege against self-incrimination concerns the threat of coercion in order to make an accused yield certain information, the right of silence relates to the drawing of adverse inferences when an accused fails to testify or to answer questions. (A. Ashworth, “Self-incrimination in European Human Rights law – a pregnant pragmatism?”, *Cardozo Law Review*, Vol. 30, No. 3, 2008, 754.)

¹³⁴⁴ *Saunders v. United Kingdom*, App. No. 19187/91, 23 Eur. H.R. Rep. 313 (1996).

¹³⁴⁵ A. Ashworth, “Self-incrimination in European Human Rights law – a pregnant pragmatism?”, *Cardozo Law Review*, Vol. 30, No. 3, 2008, 756.

¹³⁴⁶ In particular relating to concerns as to their compliance with standards of due process laid down by Article 6 of the ECHR. See, for instance, Slater, Donald, Thomas, Sébastien & Waelbroeck, Denis, “Competition Law Proceedings Before the European Commission and the Right to a Fair Trial: No Need for Reform?”, *European Competition Journal*, Vol. 5, No. 1, 2009; R. Nazzini, “Administrative Enforcement, Judicial Review and Fundamental Rights in EU Competition Law: A Comparative Contextual-Functionalist Perspective”, King’s College London Dickson Poon School of Law, Legal Studies Research Paper Series: Paper No. 2016-31; W. Wils, “The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis”, *World Competition: Law & Economic Review*, Vol. 27, No. 2, 2004.

¹³⁴⁷ *Ozturk v Germany*, App. No. 8544/79, 6 Eur. H.R. Rep. 409, (1984), paragraph 55-56.

¹³⁴⁸ A. Ashworth, “Self-incrimination in European Human Rights law – a pregnant pragmatism?”, *Cardozo Law Review*, Vol. 30, No. 3, 2008, 758-760, referring to *Saunders v. United Kingdom*, App. No. 19187/91, 23 Eur. H.R. Rep. 313 (1996), 2044, 2065.

features, among which the right to remain silent, should be assessed on a case-by-case basis, taking into account the circumstances of the case, the nature and the objectives of the proceedings, the intensity of the coercion exercised in taking the evidence, the existence of relevant safeguards, and the use to which the material in question was put.¹³⁴⁹ The rare departures from the principle call for a special justification, over and above the broader public interest. This very brief overview of the early case law already indicates that the Strasbourg jurisprudence on the privilege against self-incrimination was susceptible to criticisms of inconsistency and under-development.¹³⁵⁰

Apart from the aforementioned discussion on the scope *ratione personae* of the privilege, it is questioned as well whether the right encompasses an absolute right of silence, or rather allows a person or undertaking to be forced to respond to questions of a ‘factual nature’.¹³⁵¹ The only EU document in the context of competition law specifically mentioning self-incrimination is Regulation 1/2003. It provides in recital 23 that the Commission may require information to be supplied in the context of investigations under Article 101 and 102 TFEU, and that while undertakings cannot be forced to admit that they have committed an infringement when complying with such a decision of the Commission, they are nevertheless obliged to answer factual questions and to provide documents that may be used to establish the existence of an infringement on their part.

The CJEU considers that its judgements are consistent with Article 6 of the ECHR.¹³⁵² The case-law of both courts does, however, diverge. In *Orkem* and *SGL Carbon*, the CJEU clarified that obliging undertakings to produce possibly incriminating pre-existing documents does not violate the privilege against self-incrimination, as currently codified in Regulation 1/2003. The Court based itself on ‘*whether and to what extent the general principles of Community law, of which fundamental rights form an integral part and in the light of which all Community legislation must be interpreted, require, [...] recognition of the right not to supply information capable of being used in order to establish, against the person supplying it, the existence of an infringement of the competition rules.*’¹³⁵³ It concluded that Member State legislation generally only recognized such a right to a natural person charged with an offence in criminal proceedings, and not for legal persons committing economic infringements, in particular relating to competition law.¹³⁵⁴ On the contrary, undertakings under investigation are held to actively cooperate with the Commission and must make all information relating to the subject-matter of the investigation

¹³⁴⁹ A. Andreangeli, “Competition Law and Human Rights: Striking a Balance Between Business Freedom and Regulatory Intervention”, Edinburgh Research Explorer, 2009, http://www.research.ed.ac.uk/portal/files/14818433/Competition_Law_Human_Rights_Striking_a_Balance_Between_Business_Freedom_and_Regulatory_Intervention.pdf (accessed February 2017), 6-7; A. Ashworth, “Self-incrimination in European Human Rights law – a pregnant pragmatism?”, *Cardozo Law Review*, Vol. 30, No. 3, 2008, 763-764, referring to *O’Halloran and Francis v United Kingdom*, App. No. 15809/02, 25624/02, 46 Eur. H.R. Rep. 407 (2008), 410.

¹³⁵⁰ A. Ashworth, “Self-incrimination in European Human Rights law – a pregnant pragmatism?”, *Cardozo Law Review*, Vol. 30, No. 3, 2008, 760-762. For instance, in *Jalloh v. Germany* (*Jalloh v. Germany*, App. No. 54810/00, 44 Eur. H.R. Rep. 32 (2007)) the Court stated that the weight of the public interest in the investigation and punishment of the offence was a relevant factor. This contradicts the statement in *Saunders* that the privilege applies “*to criminal proceedings in respect of all types of criminal offences without distinction from the most simple to the most complex.*” (*Saunders v. United Kingdom*, App. No. 19187/91, 23 Eur. H.R. Rep. 313 (1996), 2044, 2066) See A. Ashworth, “Self-incrimination in European Human Rights law – a pregnant pragmatism?”, *Cardozo Law Review*, Vol. 30, No. 3, 2008, 766-767.

¹³⁵¹ See I. Van Bael, *Due Process in Competition Proceedings*, Alphen aan den Rijn, Wolters Kluwer, 2011.

¹³⁵² C. Jones, “Into the parallel universe: procedural fairness in private litigation after the Damages Directive”, 9th ASCOLA Conference Warsaw 2014 on Procedural Fairness in Competition Proceedings, Centre for Antitrust and Regulatory Studies, University of Warsaw, Warsaw, 26-28 June 2014, 12.

¹³⁵³ Judgment of 18 October 1989, *Orkem v Commission of the European Communities*, 374/87, EU:C:1989:387, paragraph 28.

¹³⁵⁴ *Ibid.*, paragraph 29.

available to it.¹³⁵⁵ According to the Court, competition law in particular is a field that requires cooperation of undertakings more than other fields, due to the secretive nature of some infringements and the fact that competition law investigations are very fact-intensive. Firms involved in competition proceedings, despite not being entitled to ‘evade the Commission’s investigations’, do enjoy a limited degree of protection against self-incrimination in the course of the preliminary stages of the procedure to avoid irremediably damaging their rights of the defence.¹³⁵⁶ In sum, the Commission is allowed to compel an undertaking to provide information and documents in the undertaking’s possession, even if such information may be used to establish the existence of a competition law infringement against that undertaking.¹³⁵⁷ The CJEU recognised that an undertaking subject to an investigation relating to competition law may indeed rely on Article 6 ECHR, but claimed that neither the wording of the Article nor the ECtHR case-law indicated that it upheld the right not to give evidence against oneself.¹³⁵⁸ However, the Court did nuance this by allowing the privilege to be asserted to prevent testimony in oral or written form in response to information requests or oral interview requests.¹³⁵⁹ A company may remain silent to the extent that the information requested by the Commission can be considered as compelling the company to provide answers which might involve an admission on its part of the existence of an infringement, as it is the task of the Commission to provide proof.¹³⁶⁰ This is a permitted exception to the aforementioned obligation of companies to cooperate with the Commission during competition investigations.¹³⁶¹ It is unclear whether a distinction should be made in the context of a leniency application between previously existing documents and oral or written testimony provided by individuals or undertakings respectively, as one could claim that the right against self-incrimination has been waived completely once a leniency application has been made. A similar approach is followed by the US judiciary with regard to the Fifth Amendment privilege against self-incrimination. In the US, the privilege is a personal right of natural persons and applies only to spoken or testimonial communications.¹³⁶² The European Courts’ decision is motivated by factors relating to the efficiency and effectiveness of the Commission’s enforcement powers. It is considered that an absolute right against self-incrimination would constitute an unjustified hindrance to the Commission’s role as enforcer of EU competition law and would go beyond what is necessary in order to preserve the rights of defence of

¹³⁵⁵ Judgment of 29 June 2006, *Commission of the European Communities v SGL Carbon AG*, C-301/04 P, EU:C:2006:432, paragraph 40.

¹³⁵⁶ A. Andreangeli, “Competition Law and Human Rights: Striking a Balance Between Business Freedom and Regulatory Intervention”, Edinburgh Research Explorer, 2009, available at http://www.research.ed.ac.uk/portal/files/14818433/Competition_Law_Human_Rights_Striking_a_Balance_Between_Business_Freedom_and_Regulatory_Intervention.pdf (accessed February 2017), 7.

¹³⁵⁷ Judgment of 29 June 2006, *Commission of the European Communities v SGL Carbon AG*, C-301/04 P, EU:C:2006:432, paragraph 41.

¹³⁵⁸ Judgment of 18 October 1989, *Orkem v Commission of the European Communities*, 374/87, EU:C:1989:38, paragraph 30.

¹³⁵⁹ For a more detailed assessment of this case-law, see C. Jones, “Into the parallel universe: procedural fairness in private litigation after the Damages Directive”, 9th ASCOLA Conference Warsaw 2014 on Procedural Fairness in Competition Proceedings, Centre for Antitrust and Regulatory Studies, University of Warsaw, 26-28 June 2014, 13, 18. Judgment of 18 October 1989, *Orkem v Commission of the European Communities*, 374/87, EU:C:1989:387; Judgment of 29 June 2006, *Commission of the European Communities v SGL Carbon AG*, C-301/04 P, EU:C:2006:432.

¹³⁶⁰ Judgment of 18 October 1989, *Orkem v Commission of the European Communities*, 374/87, EU:C:1989:387, paragraph 35; Judgment of 15 June 2005, *Tokai Carbon Co. Ltd, Intech EDM BV, Intech EDM AG and SGL Carbon AG v Commission of the European Communities*, Joined cases T-71/03, T-74/03, T-87/03 and T-91/03, EU:T:2005:220, paragraph 402.

¹³⁶¹ I. Van Bael, *Due process in competition proceedings*, Alphen aan den Rijn, Wolters Kluwer, 2011, 158-160.

¹³⁶² C. Jones, “Into the parallel universe: procedural fairness in private litigation after the Damages Directive”, 9th ASCOLA Conference Warsaw 2014 on Procedural Fairness in Competition Proceedings, Centre for Antitrust and Regulatory Studies, University of Warsaw, 26-28 June 2014, 14.

undertakings.¹³⁶³ The above is in contrast, however, with the statement of the ECtHR stated that “*the right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating.*”¹³⁶⁴ There is conflict therefore between the approaches of both courts.¹³⁶⁵

B) Private life

It is rightly stated by some that “[c]onceptually the cases of companies invoking the right to privacy in order to protect purely financial interests are [...] far away from the notion of human rights conferred to safeguard one’s aptitude to establish and develop interpersonal relationships” and that therefore in the case of legal persons carrying out economic activities the application of fundamental rights should not too easily lead to the recognition of claims, if they are based simply on the prevention of the risk of reputational damage or on chilling incentives to denounce competition law infringements.¹³⁶⁶ It was nevertheless established that legal entities may invoke the rights under Article 8 of the Convention.¹³⁶⁷ Even if the ECtHR stated that the entitlement of public authorities to interfere with confidentiality rights might well be more far-reaching in the sphere of professional or business activities or premises,¹³⁶⁸ it has equally confirmed that the right for a private life as contained in Article 8 ECHR (and Article 7 of the Charter) is applicable to both natural and legal persons. In its 2002 judgment *Colas Est*, the ECtHR confirmed that the rights contained in Article 8 of the Convention may, in certain circumstances, be held to include the right to respect for a company’s registered office, branches, or other business premises.¹³⁶⁹ This case-law relates to the situation of inspections carried out in business practices. ECtHR case-law expressly considering a legal person’s right to have confidential business information protected under Article 8 ECHR is non-existent. The right of companies under Article 8 ECHR relates to arbitrary and disproportionate interference by public authorities, and seems to relate rather to the company’s ‘home’ and correspondence.¹³⁷⁰

The right to protection of reputation also constitutes a right which is protected by Article 8 of the Convention as part of the right to respect for private life. However, for Article 8 to come into play, it is required that the attack on the reputation must be significantly serious and cause prejudice to the personal enjoyment of the right to respect for private life. The ECtHR has moreover stated that

¹³⁶³ Judgment of 14 March 2014, *Buzzi Unicem Sp.A v European Commission*, T-297/11, EU:T:2014:122, paragraph 60.

¹³⁶⁴ *Saunders v. United Kingdom*, App. No. 19187/91, 23 Eur. H.R. Rep. 313 (1996), 71.

¹³⁶⁵ A. Andreangeli, “Competition Law and Human Rights: Striking a Balance Between Business Freedom and Regulatory Intervention”, Edinburgh Research Explorer, 2009, http://www.research.ed.ac.uk/portal/files/14818433/Competition_Law_Human_Rights_Striking_a_Balance_Between_Business_Freedom_and_Regulatory_Intervention.pdf (accessed February 2017), 19.

¹³⁶⁶ P. Van Nuffel, “Human rights and competition law: do undertakings have a ‘fundamental right’ of protection of confidential information?” in D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae Civis – Liber Amicorum Jacques Steenbergen*, Brussel, Larcier, 2014, 591-592.

¹³⁶⁷ C. Grabenwarter, *European Convention on Human Rights – Commentary*, Munich, Beck (in Gemeinschaft mit Hart Publishing, Oxford, Nomos Verlagsgesellschaft, Baden-Baden und Helbing & Lichtenhahn/Basel), 2014, 186.

¹³⁶⁸ *Niemietz v. Federal Republic of Germany*, App. No. 13710/88, 251-B Eur. H.R. Rep. 97 (1992), paragraph 31: “[...] to interpret the words “private life” and “home” as including certain professional or business activities or premises would be consonant with the essential object and purpose of Article 8 (art. 8), namely to protect the individual against arbitrary interference by the public authorities [...]. Such an interpretation would not unduly hamper the Contracting States, for they would retain their entitlement to “interfere” to the extent permitted by paragraph 2 of Article 8 (art. 8-2); that entitlement might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case.”

¹³⁶⁹ *Colas Est and others v France*, App. No. 37971/97, 39 Eur. H.R. Rep 17 (2002).

¹³⁷⁰ P. Van Nuffel, “Human rights and competition law: do undertakings have a ‘fundamental right’ of protection of confidential information?” in D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae Civis – Liber Amicorum Jacques Steenbergen*, Brussel, Larcier, 2014, 586.

*“Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one’s own actions [...]”*¹³⁷¹ A company can therefore not rely on the right of protection of reputation to oppose the disclosure of incriminating information. This was confirmed by the General Court in the *Evonik* case.¹³⁷²

The President of the General Court recognised in some recent orders the fundamental right of an undertaking to respect for its private life.¹³⁷³ In the *Varec* case, relating to public procurement, the CJEU allowed legal persons to rely on Article 8 ECHR and the corresponding Article 7 of the Charter to protect confidential business-related information from disclosure. The Court first confirmed that the right to the protection of confidential information is in essence a substantive right, but that its application can have procedural consequences. The right to a fair trial in Article 6 ECHR implies, amongst other things, that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal. The ECtHR has consistently held that one way to assess this ‘fairness’ is via the extent to which proceedings occur according the adversarial principle. The adversarial principle generally means that parties have the right to inspect and comment on the evidence and observations submitted to the court. The Court added, however, that in some cases it may be justified to withhold certain information in this process in order to preserve the fundamental rights of a third party or to safeguard an important public interest. It then continued that one of the fundamental rights that may be protected in this way is the right to respect for private life, a right flowing from the common constitutional traditions of the Member States and enshrined in Article 8 ECHR and Article 7 of the Charter of fundamental rights of the European Union. It recognised the case-law of the ECtHR that expanded the notion of ‘private life’ to the professional or commercial activities of either natural or legal persons and recalled its own case-law acknowledging that the protection of business secrets is a general principle. In the case at hand the right to confidential treatment should be balanced against the public interest of maintaining fair competition in contract award procedures, justifying that in the context of a review of a decision taken by a contracting authority in relation to a contract award procedure, the parties are not entitled to unlimited and absolute access to all of the information relating to the award procedure concerned. This right to protection of confidential information must, however, respect the requirements of effective legal protection and the rights of defence of the parties, as well as with the right to a fair trial in general.¹³⁷⁴

C) Personal data

Article 8 ECHR has also evolved to contain the protection of personal information due to the possibilities of modern computer-based collection and data-analysis. Data-protection is seen as a

¹³⁷¹ *Axel Springer AG v Germany*, App. No. 39954/08, 55 Eur. H.R. Rep. 183 (2012), 83-84.

¹³⁷² “I note that the appellant does not dispute the General Court’s finding that it cannot properly rely on the loss of its reputation resulting from the publication of the information relating to its unlawful activities, as that loss was the foreseeable consequence of its own actions.” (Opinion of Advocate General Szpunar in *Evonik Degussa GmbH v European Commission*, C-162/15, EU:C:2016:587, paragraph 171.)

¹³⁷³ P. Van Nuffel, “Human rights and competition law: do undertakings have a ‘fundamental right’ of protection of confidential information?” in D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae Civis – Liber Amicorum Jacques Steenbergen*, Brussel, Larcier, 2014, 587. See Order of the President in *Akzo Nobel NV and Others v European Commission*, T-345/12 R, EU:T:2012:605, paragraph 32-33; Order of the President in *Pilkington Group Ltd v European Commission*, T-462/12 R, EU:T:2013:119, paragraph 44-45 (on the envisaged publication of a non-confidential version of an infringement decision); Order of the President in *AbbVie v Ema*, T-44/13 R, EU:T:2014:694, paragraph 47-48 (on access to information submitted by an undertaking as part of its request for a marketing authorisation.)

¹³⁷⁴ Judgement of 14 February 2008, *Varec SA v Belgian State*, C-450/06, EU:C:2008:91, paragraph 28, 46-52.

particular aspect of the right to respect for private life where data of a subject are collected, recoded or analyzed and a person's private life is thereby affected. This can also involve public information, where it is systematically collected and stored by the authorities. This entails that business matters may also be included rather than mere information on a person's private life.¹³⁷⁵

The right to the protection of personal data is explicitly acknowledged in Article 8(1) of the Charter and Article 16(1) TFEU. EU as well as international instruments, however, are unanimous in indicating natural persons as the sole owner of the right to have personal data protected. Personal 'company' data simply do not exist. The Annex to the OECD Recommendation containing guidelines on the protection of privacy and transborder flows of personal data, both in the original 1980 and the revised 2013 version, defines 'personal data' as "*any information relating to an identified or identifiable individual*".¹³⁷⁶ Similarly, the Council of Europe Convention already in its title indicates that it only applies to individuals.¹³⁷⁷

The Commentary to the Charter explains that "*Article 8 of the Charter is inspired by, and is based on, a variety of legal instruments although the protection of personal data is not recognized as a specific right in the framework of existing international instruments on the protection of human rights.*"¹³⁷⁸ It is based in particular on the protection of privacy and private life contained Article 8 ECHR and developed by the case law of the ECtHR.¹³⁷⁹ It is not an absolute right, and must be weighed in particular against the right to freedom of expression and information, including "*the freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers*".¹³⁸⁰ The Commentary explicitly refers to the potential tension between the right of access to documents in Article 42 of the Charter and the right of individuals to protection of their personal data, suggesting that the weight of the respective rights should be defined and their application optimized in such a way that the right with less weight remains guaranteed as far as possible.¹³⁸¹

Data protection was further elaborated upon in EU secondary legislation, which was recently revised entirely.¹³⁸² The original Data Protection Directive¹³⁸³ defined personal data as "*any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his*

¹³⁷⁵ C. Grabenwarter, *European Convention on Human Rights – Commentary*, Munich, Beck (in Gemeinschaft mit Hart Publishing, Oxford, Nomos Verlagsgesellschaft, Baden-Baden und Helbing & Lichtenhahn/Basel), 2014, 189.

¹³⁷⁶ OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, 23 September 1980, <http://www.oecd.org/internet/ieconomy/oecdguidelinesontheprivacyandtransborderflowsofpersonaldata.htm#part1> (accessed February 2017); OECD, *The OECD privacy framework*, 2013, http://www.oecd.org/sti/ieconomy/oecd_privacy_framework.pdf (accessed February 2017).

¹³⁷⁷ Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg, 28 January 1981.

¹³⁷⁸ EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, June 2006, http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf (accessed June 2017), 90.

¹³⁷⁹ *Ibid.*

¹³⁸⁰ Article 10 of the ECHR, set out in Article 11 of the Charter.

¹³⁸¹ EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union*, June 2006, http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf (accessed June 2017), 91-92.

¹³⁸² See <http://ec.europa.eu/justice/data-protection/> (accessed February 2017).

¹³⁸³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), *OJ L* 119, 4.5.2016.

physical, physiological, mental, economic, cultural or social identity.¹³⁸⁴ The CJEU confirmed that its provisions were to be interpreted in the light of Article 8 ECHR, and should be seen as offering both substantive and procedural guarantees to individuals against risks relating to the processing of their personal data.¹³⁸⁵ Both the new regulation and the new directive focus exclusively on natural persons.¹³⁸⁶ The definition of personal data has not significantly changed in these instruments.¹³⁸⁷ The Regulation further explains that the right to the protection of personal data is not an absolute right, but its function in society must be taken into account and it should be balanced against other fundamental rights, in accordance with the principle of proportionality.

3.4.4 Exchange of non-evidence

These roots indicate that a delicate balancing act should take place between the protection of confidential information and ensuring wide access to information. A ready-made solution is not available. The ICN in 2007 distinguished four categories of information that competition agencies may wish to exchange. The first one was information that is already in the public domain, meaning that it has been published or otherwise made public.¹³⁸⁸ The exchange of this type of information is generally only hindered by practicalities such as language or resource constraints.¹³⁸⁹ Information that is not necessarily in the public domain, but is generated within the competition authority, so-called agency information, was identified as a second category.¹³⁹⁰ Information that is provided by the parties (voluntarily or compulsory) and in the possession of the agency constituted a third category. The ICN recognised information obtained from the parties at the request of another agency as a final category.¹³⁹¹ The OECD came to a similar conclusion in 2012 and identified three types of information that agencies may wish to exchange in the course of an investigation, concurring with the first three categories identified by the ICN.¹³⁹² This typology was altered somewhat following the 2012 OECD/ICN Joint Survey. Again, the first category was publicly available information. Quite

¹³⁸⁴ Article 2(a) Directive 95/46/EC.

¹³⁸⁵ EU Network of Independent Experts on Fundamental Rights, Commentary of the Charter of Fundamental Rights of the European Union, June 2006, http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf, (accessed June 2017), 92.

¹³⁸⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), *OJ L* 119, 4.5.2016; Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, *OJ L* 119, 4.5.2016.

¹³⁸⁷ “any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.” Article 4(1) Regulation 2016/679.

¹³⁸⁸ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 28-29.

¹³⁸⁹ OECD, Limitations and constraints to international co-operation, Issues paper by the secretariat, DAF/COMP/WP3(2012)8, 23 October 2012, 4.

¹³⁹⁰ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 28-29; OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 86.

¹³⁹¹ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 7.

¹³⁹² OECD, Limitations and constraints to international co-operation, Issues paper by the secretariat, DAF/COMP/WP3(2012)8, 23 October 2012, 4.

surprisingly, only 49% of respondents (27 agencies) were authorised to freely share public information with other enforcement agencies. Next is the category of non-public agency information. This information was identified by 29% of respondents as information that is exchanged among enforcers. Confidential information was then identified as the third form of information that can be exchanged. Many respondents, 31,56%, can only exchange such information when there is consent from the parties, mostly in the form of a waiver, while 18% indicated that they cannot disclose this type of information to other enforcers unless they are part of a regional network that allows it. The next category, identified by 22% of respondents was non-confidential, case-related information. Finally, 4 respondents indicated the relevance of the publicly accessible reasoning provided in support of enforcement decisions, in which non-confidential information (or non-confidential versions of confidential information) is made available.¹³⁹³

Where there is room for immediate improvement is the delineation of non-public, but also non-confidential, ‘agency information’. Agency information can be defined as information that is generated within an agency and does not specifically identify confidential information of individual enterprises. Competition agencies are not legally prohibited from disclosing such information, but it is nevertheless generally kept from the public.¹³⁹⁴ While such information is legitimately withheld from the parties to a case, there is no reason not to exchange such information among peers.¹³⁹⁵ There is confusion, however, on what this category of information encompasses, resulting in sub-optimal exchanges. The ICN already in 2007 recognised that there is a lack of clarity surrounding the types of agency information that can be exchanged and used, and concluded that public information and agency information should be more widely exchanged. This area was identified as in need for improvement by the OECD as well.¹³⁹⁶ While the focus has mainly been on the exchange of evidence, clarity on the exchange of information other than evidence may present an easier way to significantly increase information streams among competition agencies. Guidelines could be developed containing definitions as to what information normally can and cannot be exchanged between agencies in the absence of a specific agreement or party-authorisation, as well as clarifications as to the uses to which such information may be put and the conditions under which it may be exchanged. Categories of non-public, non-confidential information could be more clearly defined, permitting a more streamlined and transparent cooperation process. This could be complemented by statements from individual agencies as to what they can and cannot exchange.¹³⁹⁷ Language or resource constraints that hinder cooperation can also be addressed in bilateral agreements. Arrangements can be made with regard to potential translation costs, and work-sharing may limit the overall resource implications. Up until today, however, such recommendations have not received any follow-up.

¹³⁹³ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 86-87.

¹³⁹⁴ OECD, Discussion on how to define confidential information, Contribution of the United States, DAF/COMP/WP3/WD(2013)55, 29 October 2013, 7; OECD, Inventory of co-operation agreements, Note by the secretariat, DAF/COMP/WP3(2015)12/REV1, 20 November 2015, 5, footnote 6.

¹³⁹⁵ OECD, Discussion on how to define confidential information, Contribution of the United States, DAF/COMP/WP3/WD(2013)55, 29 October 2013, 7.

¹³⁹⁶ *“Improvements could also be made in understanding what constitutes “agency information” as opposed to confidential information to facilitate exchange of the former.”* OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 55.

¹³⁹⁷ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 24, 28.

Examples of agency information that could be disclosed to another agency, following an agreement, and subject to disclosure and usage restrictions (respectively not to divulge the information outside the receiving agency and not to use it for any purposes other than the reason for which it was exchanged for instance) are: information about the existence or absence of an investigation (case-related or sector-specific); the fact that an agency has requested information from outside its jurisdiction; leads and non-confidential background information; the provisional orientation of the agency in the case, general information on how the case is analysed, for instance concerning geographic and product market definition or the assessment of competitive effects or efficiencies, potential remedies being considered, the methods applied with respect to the setting of fines and other penalties; best practices, precedents, legal opinions; and the progress in an on-going case and the likely timing of key steps in the case.¹³⁹⁸ Evidently also publicly available information should be exchanged freely.¹³⁹⁹ Agencies could then diversify provisions with respect to the conditions and safeguards applicable to the exchange of non-confidential (public) information, the exchange of agency information and the exchange of confidential information. This further break down would allow for more differentiation and more information flow than is currently the case.

3.5 Concerns about the exchange of confidential information and how they are addressed by the EU-Switzerland Agreement

The exchange of confidential information between competition authorities, no matter in what way or to which extent,¹⁴⁰⁰ faces a fair amount of scepticism and criticism. The exchange of confidential information has been met with misconception in the past, and is still beheld with suspicion today, as it represents a far-reaching form of cooperation that entails certain complexities. It is therefore important to identify these complexities and persistent concerns, and how they are addressed by the EU's second generation agreement.

3.5.1 First concern: increased liability and leakage of information

3.5.1.1 Follow-on private litigation as main concern

Is it so that business groups generally do not support the exchange of confidential information among enforcers out of fear for 'vigorous and effective enforcement' of competition laws? Perhaps some do not. However, there are far more companies that do wish to 'play according to the rules' and benefit from antitrust enforcement, than there are companies who engage in anticompetitive behaviour and do not wish to be uncovered. A company is far more likely to suffer damages due to a cartel than be a member of one, and enjoys the benefits of more efficient and effective enforcement.¹⁴⁰¹ Those opposing, however, are perhaps one of the reasons of stifling progress in the

¹³⁹⁸ Compiled data from ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 28-29; OECD, Discussion on how to define confidential information, Contribution of the United States, DAF/COMP/WP3/WD(2013)55, 29 October 2013, 7; OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 86.

¹³⁹⁹ ICN, Waivers of Confidentiality in Cartel Investigations – Explanatory Note, 2014, 5.

¹⁴⁰⁰ As is shown by the different approach taken by the EU and US, there is room for diversification in how to approach confidential information exchange among competition law enforcers, but both agreements suffer from criticism and under-use.

¹⁴⁰¹ S. Hammond, "Beating cartels at their own game – sharing information in the fight against cartels", presented at the Inaugural Symposium of the Competition Policy Research Center - Fair Trade Commission of Japan, Tokyo, 20 November 2003, 8-9.

field of international cooperation, so this illegitimate concern nevertheless deserves attention, in particular as cooperation of undertakings is a vital aspect of the public enforcement system.

So for some undertakings, an obvious concern revolving around information exchange among enforcers is that this will lead to increased and more effective public enforcement, as an investigation in one jurisdiction can more easily trigger or help advance an investigation in another one when information can be freely exchanged. More effective public enforcement is exactly one of the goals of the EU-Switzerland Agreement.¹⁴⁰² This ‘concern’ is therefore valid in the sense that this is a very likely consequence of the Agreement, but it has no legitimacy. Nevertheless, while information may be freely discussed under the Agreement, the exchange of information containing personal data, whether it occurs with or without the consent of the parties involved, is restricted to cases where competition authorities are investigating the same or related conduct or transactions. This not only ensures that the agendas of the competition agencies are not flooded with requests for assistance, it also entails that information cannot be exchanged ‘at random’.

Second, the concern exists that liability in private (follow-on) enforcement could potentially increase. Private enforcement can take the form of stand-alone litigation, or follow-on litigation. In the latter case the anticompetitive conduct was already established by a public enforcement authority before the private case was brought before a court. The claimant in both cases will still have to prove the damage suffered from the anticompetitive conduct and the causation between the breach of the competition rules and the loss. To do so, access to confidential information held by the defendants, the European Commission or national competition authorities will often be sought.¹⁴⁰³ Information exchange among enforcers is feared to lead to improved access to information by private parties via discoverability in the foreign jurisdiction of confidential information.¹⁴⁰⁴ There is extensive literature on the interplay between access to the file or discovery and leniency programmes for instance.¹⁴⁰⁵ In what follows, the concerns of the companies potentially facing private litigation will be addressed, while in the next section the concern of the public enforcers that private enforcement would undermine their leniency programmes will be scrutinized. Unbridled private enforcement poses a problem, in contrast to increased public enforcement, because the different national enforcement systems are not aligned, which presents issues with regard to due process.

In both the EU and Switzerland, judicial remedial mechanisms are traditionally left unexplored by plaintiffs.¹⁴⁰⁶ Between 2006 and 2012, less than a quarter of the Commission’s infringement decisions

¹⁴⁰² Article 1 EU-Switzerland Agreement.

¹⁴⁰³ S. Peyer, “Access to competition authorities’ files in private antitrust litigation”, *Journal of Antitrust Enforcement*, Vol. 3, No. 1, 2015, 59.

¹⁴⁰⁴ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 97.

¹⁴⁰⁵ See, for instance, A. Caruso, “Leniency programmes and protection of confidentiality: the experience of the European Commission”, *Journal of Competition Law & Practice*, Vol. 1, No. 6, 2010, 453-477; A. Petrasincu, “Discovery revisited- the impact of the US discovery rules on the European Commission’s leniency programme”, *European Competition Law Review*, Vol. 32, No. 7, 2011, 356-368; C. Nicolosi, “No good whistle goes unpunished: can we protect European Antitrust Leniency applications from discovery?”, *Northwestern Journal of International Law & Business*, Vol. 31, No. 1, 2011, 225-260; C. Canenbley & T. Steinvorth, “Effective enforcement of competition law: is there a solution to the conflict between leniency programmes and private damages actions?”, *Journal of European Competition Law & Practice*, Vol. 2, No. 4, 2011, 315- 326.

¹⁴⁰⁶ K. Moodaliyar, J. F. Reardon, S. Theuerkauf, “The Relationship between Public and Private Enforcement in Competition Law - A Comparative Analysis of South African, the European Union, and Swiss Law”, <http://www.compcom.co.za/assets/Uploads/events/10-year-review/parallel-3b/The-Relationship-between-Public-and-Private-Enforcement-of-Competition-Law-SA-EU-CH.pdf> (accessed February 2012).

were followed by damages actions. Among these actions, the vast majority were brought by large businesses, and generally only in three member states, namely the United Kingdom, Germany, and the Netherlands. In 20 out of 28 Member States no follow-on actions to Commission decisions whatsoever were reported.¹⁴⁰⁷ Empirical evidence on the share of stand-alone versus follow-on cases is contradictory. BOTTEMAN and HUGHES claim that in the EU, most private damages actions are follow-on cases rather than stand-alone cases.¹⁴⁰⁸ A study by RODGER, however, came to the opposite conclusion based on aggregate member state data.¹⁴⁰⁹ Follow-on cases based on cartel decisions of the Commission have in any event significantly increased over the last few years. This was confirmed by private practice. It was said that “*nowadays an important part of the advice we provide to customers in cartel cases refers to preparation vis-à-vis potential private claims.*”¹⁴¹⁰ Until recently, private enforcement in the EU was relatively underdeveloped. Incentives for private parties to bring court actions are less pronounced than in the US, as national courts generally do not grant punitive/treble damages, but instead provide compensation or restitution while simultaneously the costs of litigation are higher due to for instance fee-shifting statutes. Access to evidence remains difficult (see below), and judges are often under-qualified to correctly assess the damage caused by an anti-competitive practice.¹⁴¹¹ One reason why information exchange, and confidential information exchange in particular, is approached with extreme caution is linked to the adversarial and litigious nature of antitrust laws in certain jurisdictions.¹⁴¹²

Concerns were heightened for instance after the *Air Cargo* case, which related to the conspiracy of a number of major international cargo airlines to inflate the price of shipping goods by air.¹⁴¹³ Between 2000 and 2006 the airlines coordinated their actions on fuel and security surcharges. A dawn raid with global proportions led to the initiation of proceedings in the US, the EU, Australia, New Zealand, Canada and Korea. While some participants of the cartel benefitted from leniency in the EU and elsewhere, other airlines were fined and 21 individuals faced prosecution. In the US, for instance, this resulted in fines of more than USD 1.8 billion, and the imprisonment of 6 executives. The way in which this cartel faced global prosecution demonstrated that a multinational must be prepared for actions in multiple jurisdictions, and must take all jurisdictions in account in which its conduct may have an effect.¹⁴¹⁴ The case was particularly worrisome to the defendants and cartelists generally due to the series of follow-on class actions that chased the infringers during the ten years following the dawn raids. In 2015 plaintiffs in the US won the right to proceed as a certified class against the remaining defendants, after settlements of more than \$1 billion had already been reached

¹⁴⁰⁷ D. Calisti & L. Haasbeek, “The proposal for a Directive on Antitrust Damages Actions: the European Commission sets the stage for private enforcement in the European Union”, *CPI Antitrust Chronicle*, Vol. 8, August 2013, 2-3.

¹⁴⁰⁸ Y. Botteman & P. Hughes, “Access to file: striking the balance between leniency and private enforcement tools”, *The European Antitrust Review*, 2013, 3.

¹⁴⁰⁹ B. Rodger, “State of Play of Antitrust damages at Member State level – competition litigation and collective redress: a comparative EU analysis”, presented at 9th Annual Conference of the GCLC, Antitrust Damages in EU law and policy, 7-8 November, Brussels.

¹⁴¹⁰ Result of author’s law firm survey (see Annex I).

¹⁴¹¹ E. Elhauge & D. Geradin, *Global Competition Law and Economics*, 2nd ed., Oxford and Portland Oregon, Hart Publishing, 2011, 12, 53-54.

¹⁴¹² N. Ormonov, “Exchange of Information in the Enforcement of Antitrust Laws”, *Asper Review of International Business & Trade Law*, Vol. 6, 2006, 364.

¹⁴¹³ Commission Decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport, Case COMP/39258 - Airfreight Brussels, 9 November 2010.

¹⁴¹⁴ OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Background Note, DAF/COMP/GF(2012)6, 13 February 2012, 26.

with 27 airlines.¹⁴¹⁵ Private enforcement was not limited to the US. Australia, South Korea, and the UK, are only some examples of jurisdictions in which follow-on (class action) claims were made.¹⁴¹⁶ This case demonstrated that it may be uncertain how this information may be used in follow-on actions, which raised grave concerns among the business community.¹⁴¹⁷

The survey sent out to international law firms in the framework of this study revealed that generally their clients are very concerned about the disclosure of sensitive or confidential information, as the practice of when information is or is not disclosed is often not clear, and there is a risk of exposure to more and wider claims. Some firms specified that it depends on the jurisdiction, with a particular concern about the US with its disclosure and discovery rules and extensive number of civil cases. Pre-trial discovery is an unknown concept in civil law countries, which led, by the late 1960s, to a clear conflict between the civil law world and the US discovery system. In civil law countries the courts take evidence, while in the US the litigants conduct discovery and depositions. The ‘personal jurisdiction plus control’-test implies that once a court finds it has personal jurisdiction, and possession, custody, or control over the documents or assets being sought are present, there are few limits on what it can order a party to produce.¹⁴¹⁸ Federal US discovery rules broadened over time under influence of court decisions ordering the production of documents held abroad. Rule 26 of the Federal Rules of Civil Procedure, for instance, allows broad discovery of ‘any nonprivileged matter that is relevant.’ Document subpoenas can moreover be issued according to Rule 45 by litigants to non-parties, only limited to the extent that it imposes an ‘undue burden’, fails to provide a reasonable time to comply, or if it requests privileged materials. The rules do not contain any limitation on the geographical scope of information discovery requests, in contrast to the limitations imposed on deposition subpoenas. Clients are less worried about disclosure to the European Commission. The concern with regard to US discovery exists regardless of international cooperation, however, as the discovery also occurs with regard to information located abroad to be used in US litigation or investigations. Several countries have, however, threatened the stability of bilateral relations with the

¹⁴¹⁵ M. Hausfeld, B. Landau, H. Scherrer, M. Coolidge, “Multi-Billion Dollar Air Cargo Price-Fixing Litigation Headed to Trial in Brooklyn”, Hausfeld, 31 August 2015, <http://www.hausfeld.com/news/us/multi-billion-dollar-air-cargo-price-fixing-litigation-headed-to-trial-in-b> (accessed August 2016).

¹⁴¹⁶ J. Evans & A. Booth, “What Price Cooperation? The Ever Increasing Cost of Global Antitrust Cases”, *Bloomberg Law Reports*, 2010. This is different in for instance fraud or securities cases, in which companies and the DoJ can negotiate stiff financial penalties and non-prosecution agreements or pleas to less than felony charges. In contrast, a guilty plea to a felony violation of the Sherman Act renders a substantive defense of follow-on US civil class action cases virtually impossible. Often companies will therefore settle, and those that do not, such as for instance British Airways, spend years fighting over the scope of the claims and the parameters of any certified class.

¹⁴¹⁷ OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Background Note, DAF/COMP/GF(2012)6, 13 February 2012, 26; M. Hausfeld, B. Landau, H. Scherrer, M. Coolidge, “Multi-Billion Dollar Air Cargo Price-Fixing Litigation Headed to Trial in Brooklyn”, Hausfeld, 31 August 2015, <http://www.hausfeld.com/news/us/multi-billion-dollar-air-cargo-price-fixing-litigation-headed-to-trial-in-b> (accessed August 2016).

¹⁴¹⁸ The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters had as its primary goal to “bridge differences between the common law and civil law approaches to the taking of evidence abroad.” (D. Zambrano, “A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery”, *Berkeley Journal of International Law*, Vol. 34, No. 1, Spring 2016, 171) The drafting of the Convention was influenced by international comity. A system of Letters of Request was developed as the primary vehicle for the production of information abroad, placing national authorities of both the requesting country and the target country as gatekeepers. While the US ratified the Hague Convention, litigants hardly used its procedures over the next decade and Federal courts split over whether the Hague Convention provided a mandatory or an optional alternative to the Federal Rules. (Ibid., 172-173) In 1988 the Supreme Court, however, “ended any hope that the Convention might displace the Federal Rules as the primary method of transnational discovery” and affirmed the ‘personal jurisdiction plus control’-test, disregarding the Hague Convention as merely providing ‘optional procedures’ for discovery. (Ibid., 174).

US due to overbroad transnational discovery requests and foreign companies may refrain from doing business in the US due to fears of overbroad jurisdiction assertions.¹⁴¹⁹

3.5.1.2 Safeguards in the EU-Switzerland Agreement

On top of the conditions that must be fulfilled before information exchange can take place (see above, Part II, 3.2.4), safeguards are in place in the EU-Switzerland Agreement concerning both the use of exchanged information and access of third parties.¹⁴²⁰ First of all the transmitted or discussed information may only be used for the purpose of enforcing the requesting party's competition laws by its competition authority. Such enforcement activities need to have regard to the same or related conduct or transactions. Information that is obtained without consent of the party, may only be used for the purpose defined in the request for the information. Under no circumstances shall it be used to impose sanctions on natural persons.¹⁴²¹ The competition authorities of the parties may furthermore subject the use of the information exchanged to certain binding terms and conditions that they specify. It is unclear what the scope of these terms and conditions could be.¹⁴²² This provision could potentially undermine the Agreement as there appears to be no limitation to such conditions. These safeguards secure that first of all domestic procedural safeguards cannot be circumvented and secondly that exchange of information between competition authorities cannot lead to a mushrooming of unrelated procedures.

In the US-Australia Agreement the evidence that is obtained pursuant to the Agreement can principally only be used or disclosed by the requesting party to administer or enforce the antitrust laws of the that party.¹⁴²³ More specifically, antitrust evidence obtained under the Agreement may only be used or disclosed by a requesting party in the investigation or proceeding and for the purpose specified in the request.¹⁴²⁴ Antitrust evidence obtained according to the Agreement can, however, be used or disclosed for the administration or enforcement non-antitrust laws under two conditions: it must be 'essential to a significant law enforcement objective' and the authority that provided the antitrust evidence must give its prior written consent to the proposed use or disclosure.¹⁴²⁵ Moreover, if antitrust evidence obtained under the Agreement has legally been made public, the requesting party can use that information for any purpose consistent with the parties'

¹⁴¹⁹ D. Zambrano, "A Comity of Errors: The Rise, Fall, and Return of International Comity in 'Transnational Discovery'", *Berkeley Journal of International Law*, Vol. 34, No. 1, Spring 2016, 157, 159, 164, 167-168, 171, 172.

¹⁴²⁰ The protection offered to leniency information in particular is dealt with in Part II, 3.5.2.4, below.

¹⁴²¹ By prohibiting the sanctioning of natural persons, problems with regard to Article 12(3) of Regulation 1/2003 are avoided. This Article restricts the exchange of information between the Commission and the Member States with the purpose of imposing sanctions on natural persons. If the EU in its second generation agreements would allow a broader use of exchanged information, it would discriminate against its own Member States. It should be noted that the undertakings under investigation by the receiving Party will have access to the transmitted information and may choose to start civil proceedings to seek compensation for the harm suffered. The limits to the use of the transmitted information set out in the Agreement are only imposed on the contracting Parties and their competition authorities, not expressly on the undertakings under investigation. P. Kobel & D. Viros, "Cooperation Agreement – Investigations – Confidentiality obligations: The European Union and Switzerland reach the agreement concerning the application of their competition law entering in force on 1st December 2014", *Concurrences*, N° 2- 2015, 213.

¹⁴²² Article 8 EU-Switzerland Agreement.

¹⁴²³ Article VII(A) US-Australia Agreement. The term 'administer or enforce' seems to be a fixed expression, but it is unclear what exactly the difference between the two activities entails.

¹⁴²⁴ It is moreover specified that when the requested Party is Australia, consent is subject to any necessary approval from the Attorney General.

¹⁴²⁵ "In the case of the United States, the Executing Authority shall provide such consent only after it has made the determinations required for such consent by its mutual assistance legislation."

mutual assistance legislation.¹⁴²⁶ Such widening of the use of exchanged information is not allowed for in the EU-Switzerland Agreement. It is a remarkable aspect of the US-Australia Agreement, that might be one of the reasons why only one agreement was concluded under the IAEEA.¹⁴²⁷ The parties do, however, have the right to oppose to such wide use.¹⁴²⁸ The AMC had even advised Congress to amend the IAEEA to clarify that it does not *require* AMAAs to include a provision allowing for non-antitrust uses of confidential information.¹⁴²⁹

Second, the competition authorities of the EU and Switzerland shall oppose any application of a third party or another authority for disclosure of information they received, subject to limited exceptions. Information received is generally treated as confidential according to the national legislation of the parties.¹⁴³⁰ Information can be disclosed in four cases: in order to obtain a court order in relation to the public enforcement of the party's competition laws; to undertakings involved in a competition investigation or proceedings in the framework of their rights of defence; to courts during an appeal; and to the extent that it is indispensable for the exercise of the right of access to documents under the laws of a party (transparency regulations), when the proceedings are closed.¹⁴³¹ The context in which this last exception can be invoked is rather unclear, and seems to leave a large margin of discretion to the receiving authority with regard to the indispensability. Even when information is disclosed in such cases, the Agreement proscribes that the protection of business secrets should remain fully guaranteed. Regrettably, this concept is not further defined for the purposes of the Agreement and likely is defined according to the national legislation of the parties, which may cause problems if such definitions differ.

In case information has been wrongfully used or disclosed, consultation should take place immediately between the competition authorities involved on steps to minimise any harm resulting from such use or disclosure and to avoid recurrence.¹⁴³² In the US-Australia Agreement this constitutes a ground for termination of the Agreement by the affected party.¹⁴³³

Important in the context of a cooperation agreement with the EU is the interaction with the Member States. A competition authority wishing to cooperate with the European Commission does not necessarily wish to cooperate at the same time with each of the national competition authorities. The interaction between the EU and the national competition authorities is therefore a relevant aspect to regulate in this context. The European Commission is closely linked with the national competition authorities (NCAs) of the Member States, via the European Competition Network and more precisely through its information obligations under Articles 11 and 14 of Council Regulation 1/2003

¹⁴²⁶ Article VII(C)&(D) US-Australia Agreement.

¹⁴²⁷ D. Garza, J. Yarowsky, B. Burchfield, W. S. Cannon, D. Carlton, M. Delrahim, J. Jacobson, D. Kempf, Jr., S. Litvack, J. Shenefield, D. Valentine, J. Warden, *Antitrust Modernization Commission - Report and Recommendations*, April 2007, available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (accessed May 2015), 218.

¹⁴²⁸ Article VII US-Australia Agreement.

¹⁴²⁹ D. Garza, J. Yarowsky, B. Burchfield, W. S. Cannon, D. Carlton, M. Delrahim, J. Jacobson, D. Kempf, Jr., S. Litvack, J. Shenefield, D. Valentine, J. Warden, *Antitrust Modernization Commission - Report and Recommendations*, April 2007, available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (accessed May 2015), 214.

¹⁴³⁰ Article 9 EU-Switzerland Agreement.

¹⁴³¹ European Parliament, Directorate-General for Internal Policies, Policy Department A – Economic and Scientific Policy, Competition Policy in International Agreements – Study for Econ Committee, IP/A/ECON/2015-02, August 2015, 22.

¹⁴³² Article 9(2) EU-Switzerland Agreement.

¹⁴³³ Article VI(C & D) & Article XIII(C) US-Australia Agreement.

and Article 19 of Council Regulation 139/2004.¹⁴³⁴ Article 10 of the EU-Switzerland Agreement regulates this relationship, as well as the relationship with the EFTA Surveillance Authority. The Commission may inform the NCAs of the Member States of the existence of any cooperation and coordination of enforcement activities, and may inform the NCA of a Member State whose important interests are affected of the notifications sent to it by the Swiss competition authority. Transmitted information may only be disclosed to the Member States to fulfil the prior mentioned information obligations. Equally, transmitted information can only be disclosed to the EFTA Surveillance Authority in order to fulfil the obligations under Articles 6 and 7 of Protocol 23 of the EEA Agreement concerning the cooperation between the surveillance authorities. Information that is communicated in any of the above ways can only be used to enforce the EU's competition laws by the Commission and cannot be disclosed, the competition authorities of the Member States or the EFTA can therefore not initiate proceedings on that basis. Information exchange with the EU will therefore not lead to excessive member state enforcement on the basis of exchanged information.

3.5.1.3 Safeguards in domestic legislation: the Transparency Regulation and Damages Directive

Once (confidential) information is exchanged, it falls under the protection offered in the receiving jurisdiction. As second generation agreements explicitly or implicitly require reciprocity, and therefore imply similar levels of protection, EU legislation provides a relevant image of the level of protection that will generally be valid for information exchanged under a cooperation agreement concluded by the EU.

In the EU the so-called Transparency Regulation governs public access to information in possession of the European Parliament, the Council and the Commission.¹⁴³⁵ It was confirmed in case-law that this regulation aims to provide to the public the widest possible access to documents of the institutions according to the principles of openness and transparency in the Treaties (see below, Part II, 3.4.3).¹⁴³⁶ Exceptions, to be interpreted restrictively, relate to situations in which a prevailing public or private interest demands confidentiality. Access to documents shall be denied to protect the public interest, in particular regarding public security, defence and military matters, international relations, and the financial, monetary or economic policy of the Community or a Member State. It will also be protected in the interest of the privacy and the integrity of the individual, and, unless there is an overriding public interest, where disclosure would undermine the protection of

¹⁴³⁴Article 11 Regulation 1/2003 regulates 'Cooperation between the Commission and the competition authorities of the Member States'. Article 14 Regulation 1/2003 regards the Advisory Committee on Restrictive Practices and Dominant Positions that is composed of representatives of the competition authorities of the Member States and is consulted by the Commission prior to taking decisions under Articles 7, 8, 9, 10, 23, Article 24(2) and Article 29(1) of the Regulation. Article 19 Regulation 139/2004 deals with the 'Liaison with the authorities of the Member States' in merger cases.

¹⁴³⁵ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001 (Transparency Regulation).

¹⁴³⁶ See Judgment of 29 June 2010, *European Commission v Technische Glaswerke Ilmenau GmbH*, C-139/07 P, EU:C:2010:376, paragraph 51. Judgment of 21 September 2010, *Kingdom of Sweden v Association de la presse internationale ASBL (API) and European Commission, Association de la presse internationale ASBL (API) v European Commission and European Commission v Association de la presse internationale ASBL (API)*, Joined cases C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 69-70; Judgment of 28 June 2012, *European Commission v Éditions Odile Jacob SAS*, C-404/10 P, EU:C:2012:393, paragraph 111; Judgment of 28 June 2012, *European Commission v Agrofert Holding a.s.*, C-477/10 P, EU:C:2012:394, paragraph 53; Judgment of 14 November 2013, *Liga para a Protecção da Natureza (LPN) and Republic of Finland v European Commission*, Joined Cases C-514/11 P and C-605/11 P, EU:C:2013:738. Also see C. Jones, "The quality of mercy and the quality of justice: reflections on the discovery of leniency documents and private actions for damages in the European Union" in N. Charbit, E. Ramundo, A. Chetova & A. Slater (eds) *William E. Kovacic, An antitrust tribute, Liber Amicorum – Volume I*, New York, Institute of Competition Law, 2012, 252.

commercial interests of natural or legal persons, court proceedings and legal advice, and the purpose of inspections, investigations and audits.¹⁴³⁷

Much debate has arisen, in particular in a competition law context, on the exact scope of two particular grounds for non-disclosure contained in Article 4(2) Transparency Regulation, namely commercial interest, and protection of the purpose of investigations.¹⁴³⁸ In the *Agrofert* and *Odile Jacob* appeal cases it was recalled that Regulation no 1049/2001 and the specific regulation in the field of merger control have different objectives and should be applied in a compatible and coherent manner.¹⁴³⁹ Due to the risk that generalised access to a merger file would undermine the merger control system, the Court claimed that disclosure of documents relating to merger control proceedings is presumed to undermine the protection of the commercial interests of the undertakings as well as the protection of the purpose of investigations in merger control proceedings.¹⁴⁴⁰ Also in state aid cases such a presumption was found present.¹⁴⁴¹ The General Court in *Netherlands v Commission* established the existence of a similar presumption in cartel cases.¹⁴⁴² This was confirmed in the *EnBW* appeal case. Certain categories of documents¹⁴⁴³ fall under the exceptions of Article 4(2) of the Transparency Regulation and there is no need to assess such documents on an individual basis.¹⁴⁴⁴ The Court in *EnBW* concluded that generalised access under Regulation 1049/2001 would jeopardise the balance established in Regulations 1/2003 and 773/2004

¹⁴³⁷ Article 4(1) and 4(2) Transparency Regulation. Internal documents in on-going cases shall be protected if the decision-making process would be seriously undermined by disclosure of such documents, save overriding public interest. If those documents contain opinions for internal use as part of deliberations and preliminary consultations within the institution, protection is extended even after the decision has been taken, if disclosure of the document would seriously undermine the institution's decision-making process. With regard to documents originating from a Member State, the latter's prior agreement is required. (Article 4(3) and 4(5) Transparency Regulation).

¹⁴³⁸ For example: Judgment of 15 December 2011, *CDC Hydrogene Peroxide Cartel Damage Claims (CDC Hydrogene Peroxide) v European Commission*, T-437/08, EU:T:2011:752; Judgment of 28 June 2012, *European Commission v Éditions Odile Jacob SAS*, C-404/10 P, EU:C:2012:393; Judgment of 13 September 2013, *Kingdom of the Netherlands v European Commission*, T-380/08, EU:T:2013:480. Article 4(2) Transparency Regulation states: "The institutions shall refuse access to a document where disclosure would undermine the protection of: - commercial interests of a natural or legal person, including intellectual property, - court proceedings and legal advice, - the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure."

¹⁴³⁹ Judgment of 28 June 2012, *European Commission v Agrofert Holding a.s.*, C-477/10 P, EU:C:2012:394, paragraph 51-52; Judgment of 28 June 2012, *European Commission v Éditions Odile Jacob SAS*, C-404/10 P, EU:C:2012:393, paragraph 109-110.

¹⁴⁴⁰ Judgment of 28 June 2012, *European Commission v Agrofert Holding a.s.*, C-477/10 P, EU:C:2012:394, paragraph 61-64; Judgment of 28 June 2012, *European Commission v Éditions Odile Jacob SAS*, C-404/10 P, EU:C:2012:393, paragraph 120-123.

¹⁴⁴¹ Judgment of 29 June 2010, *European Commission v Technische Glaswerke Ilmenau GmbH*, C-139/07 P, EU:C:2010:376, paragraph 55-57 and Judgment of 28 June 2012, *European Commission v Éditions Odile Jacob SAS*, C-404/10 P, EU:C:2012:393, paragraph 117-118.

¹⁴⁴² Judgement of 13 September 2013, *Netherlands v Commission*, case T-380/08, EU:T:2013:480, paragraph 42.

¹⁴⁴³ The categories are: "(1) documents provided in connection with an immunity or leniency application, namely statements from the undertakings in question and all documents submitted by them in connection with the immunity or leniency application ('category 1'); (2) requests for information and the parties' replies to those requests ('category 2'); (3) documents obtained during inspections, namely documents seized during on-the-spot inspections at the premises of the undertakings concerned ('category 3'); (4) the statement of objections and the parties' replies thereto ('category 4'); (5) internal documents: (a) documents relating to the facts, that is, (i) background notes on the conclusions to be drawn from the evidence gathered, (ii) correspondence with other competition authorities, and (iii) consultation of other Commission departments that were involved in the case ('category 5(a)'); (b) procedural documents, that is, inspection warrants, inspection reports, lists of documents obtained in the course of inspections, documents concerning the service of certain documents and file notes ('category 5(b)')." Judgment of 27 February 2014, *European Commission v EnBW Energie Baden-Württemberg AG*, C-365/12 P, EU:C:2014:112, paragraph 16.

¹⁴⁴⁴ Judgment of 27 February 2014, *European Commission v EnBW Energie Baden-Württemberg AG*, C-365/12 P, EU:C:2014:112, paragraph 66, 68.

“between the obligation on the undertakings concerned to submit to the Commission possibly sensitive commercial information [...] and the guarantee of increased protection, by virtue of the requirement of professional secrecy and business secrecy, for the information so provided to the Commission[...].”¹⁴⁴⁵ The Commission may categorise documents deserving of protection from disclosure in view of the size of the Commission’s records. The heavy burden of proof is on the applicant, who must demonstrate that the interest in disclosure outweighs the interest in protection. The broad categories of documents that are protected cannot be disclosed until the decision in the case is final, including the entire time span of any potential appeal proceedings. This significantly limits private parties’ chances of successfully claiming damages, unless the period of limitation for bringing a claim in the national court is suspended.¹⁴⁴⁶ According to Advocate General SZPUNAR in the *Evonik* appeal case, the abovementioned presumption was established in favour of the Commission and can therefore not be raised against the Commission itself. On the other hand, the Commission cannot presume that its entire file is confidential.¹⁴⁴⁷

Gaining access to the Commission’s file via the Transparency Regulation is therefore not an easy task for damage claimants. They can, however, benefit from the public versions of cartel decisions. The EU courts in recent case-law confirmed the significant margin of discretion belonging to the Commission when deciding to publish more extensive and detailed public cartel decisions, containing more information relating to the operation of the cartel and thereby serving as a better source of evidence in actions for damages.¹⁴⁴⁸ In particular leniency related information may be included in the public version of a Commission decision, as long as such information does not permit, directly or indirectly, the identification of the source of the information.¹⁴⁴⁹ The general presumption established in *EnBW*, however, does not apply to the publication of passages from the statements of applicants for leniency in the non-confidential versions of the Commission’s decisions. Regulation 1049/2001 does not apply in this context, nor can the case-law deriving from this Regulation be transposed to the context of the publication of infringement decisions.¹⁴⁵⁰ This case-law is considered as controversial, as allowing the Commission to reconsider the content of its decisions even a year after first publication severely affects the effectiveness of the aforementioned limits to disclosure set up by EU regulations.¹⁴⁵¹ This case-law does not, however, grant a *carte blanche* to the Commission. The Commission should take reasonable measures to conceal the source of the evidence obtained in the context of cooperation. Speculation by readers of the decision cannot be

¹⁴⁴⁵ Ibid., paragraph 90.

¹⁴⁴⁶ S. Peyer, “Access to competition authorities’ files in private antitrust litigation”, *Journal of Antitrust Enforcement*, Vol. 3, No. 1, 2015, 65, 68-69.

¹⁴⁴⁷ Opinion of Advocate General Szpunar in *Evonik Degussa GmbH v European Commission*, C-162/15, EU:C:2016:587, paragraph 154.

¹⁴⁴⁸ Judgment of 28 January 2015, *Evonik Degussa GmbH v Commission*, T-341/12, EU:T:2015:51; Judgment of 28 January 2015, *Akzo Nobel NV and others v Commission*, T-345/12, EU:T:2015:50; Judgment of 14 March 2017, *Evonik Degussa GmbH v European Commission*, Case C-162/15 P, EU:C:2017:205. For a detailed account of the case-law on this matter, see I. Vandenborre, T. Goetz, & A. Kafetzopoulos, “Access to file under European competition law”, *Journal of European Competition Law & Practice*, Vol. 6, No. 10, 747-756.

¹⁴⁴⁹ Opinion of Advocate General Szpunar in *Evonik Degussa GmbH v European Commission*, C-162/15, EU:C:2016:587, paragraph 148. Judgment of 28 January 2015, *Akzo Nobel NV and Others v European Commission*, Case T-345/12, EU:T:2015:50, paragraph 109.

¹⁴⁵⁰ Ibid., paragraph 72, 77, 79.

¹⁴⁵¹ Y. Anselin, D. Damaj, “The General Court of the European Union authorizes the Commission to communicate information submitted in support of its leniency program, through the publication of an new and more detailed version of its penalty decision in the hydrogen peroxide cartel (Akzo Nobel, Eka Chemicals)”, *e-Competitions National Competition Laws Bulletin*, N° 72350, 1-2.

sufficient to exclude publication of all leniency-related information, merely because such information was submitted voluntarily.¹⁴⁵²

Finally, the relatively recent Damages Directive deserves to be mentioned. The legislative saga leading to the Damages Directive had been stalled since the Commission's proposal for EU-wide antitrust damages legislation and the Green Paper on the topic in 2005.¹⁴⁵³ The proposed Directive regained momentum after cases such as *Pfleiderer* and *Donau Chemie* and finally entered into force on 26 December 2014, to be implemented by Member States by 27 December 2016. In the *Pfleiderer* case, and confirmed by the *Donau Chemie* case, the Court established that in absence of EU legislation, following the principles of equivalence and effectiveness, national courts should decide on a case-by-case basis whether disclosure of leniency information is justified, by balancing and weighing the interest of the private litigant to recover damages on the one hand and the protection of the effectiveness of the leniency programme on the other hand.¹⁴⁵⁴ According to the Court the right for private parties to obtain compensation for harm suffered due to anticompetitive behaviour stood in the way of an outright refusal to access leniency documents.¹⁴⁵⁵ The Court explicitly stated that outright refusal to grant access to evidence cannot be justified by the existence of a risk that access to such evidence may undermine the effectiveness of a leniency programme. Competition authorities or opposing parties must show that there is more than a mere risk of undermining effective public enforcement.¹⁴⁵⁶ This case-law has now been made obsolete by the entry into force of the Damages Directive.

The Damages Directive, that is without prejudice to the provisions of the transparency Regulation,¹⁴⁵⁷ aims to regulate and stimulate effective private civil enforcement of competition law, as well as organise the coordination between public and private enforcement.¹⁴⁵⁸ Its focus is on compensation.¹⁴⁵⁹ Most relevant in the context of this study are the provisions in the Damages Directive dealing with disclosure of evidence, in particular evidence in the file of a competition authority.¹⁴⁶⁰ Regardless of the inherent value of the Damages Directive as a form of minimum harmonization,¹⁴⁶¹ the way information in the file of a competition agency is treated is a relevant

¹⁴⁵² Opinion of Advocate General Szpunar in *Evonik Degussa GmbH v European Commission*, C-162/15, EU:C:2016:587, paragraph 151.

¹⁴⁵³ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014. (Damages Directive)

¹⁴⁵⁴ Judgment of 14 June 2011, *Pfleiderer AG v Bundeskartellamt*, C-360/09, EU:C:2011:389; Judgment of 6 June 2013, *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*, C-536/11, EU:C:2013:366, paragraph 31.

¹⁴⁵⁵ Judgment of 14 June 2011, *Pfleiderer AG v Bundeskartellamt*, C-360/09, EU:C:2011:389, paragraph 26-28, 30.

¹⁴⁵⁶ Judgment of 6 June 2013, *Bundeswettbewerbsbehörde v Donau Chemie AG and Others*, Case C-536/11, EU:C:2013:366, paragraph 46, 48.

¹⁴⁵⁷ Recital 20 Damages Directive.

¹⁴⁵⁸ Recital 6 and Article 1 Damages Directive.

¹⁴⁵⁹ D. Calisti & L. Haasbeek, "The proposal for a Directive on Antitrust Damages Actions: the European Commission sets the stage for private enforcement in the European Union", *CPI Antitrust Chronicle*, Vol. 8, August 2013, 3.

¹⁴⁶⁰ Evidence is defined as "all types of means of proof admissible before the national court seized, in particular documents and all other objects containing information, irrespective of the medium on which the information is stored." Article 2(13) Damages Directive.

¹⁴⁶¹ While the effect and impact of the Damages Directive will to a large extent depend on the implementation by the member states, the Directive has already faced a fair amount of criticism. It is claimed in particular that the Directive does not succeed in promoting private litigation, and on the contrary, has a negative effect on follow-on actions. See S. Peyer, "Access to competition authorities' files in private antitrust litigation", *Journal of Antitrust Enforcement*, Vol. 3, No. 1, 2015, 86, and S. Peyer, "The European Damages Directive fails to deliver, but can it be fixed?", *ESRC Centre for Competition Policy Competition Law and Policy Blog*, 3 March 2015, available at

indication of the protection currently offered to documents that entered the Commission's file via exchange with a foreign competition authority. Claimants can request disclosure before national courts when they can present a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its damages claim. National courts should then be able to order the defendant or a third party to disclose relevant specified items of evidence or relevant categories of evidence, which lie in the latter's control, circumscribed as precisely and as narrowly as possible and to the extent that it is proportionate. Non-specific searches for information (so-called 'fishing expeditions') should be prevented, contrary to for instance the US practice. The Directive thereby mentions a non-exhaustive list of factors to take into account when considering the legitimate interests of all parties and third parties concerned.¹⁴⁶² It is explicitly stated that the interest of an undertaking that has infringed competition law to avoid actions for damages caused by that infringement shall not constitute an interest that deserves protection. National courts should have the means to protect confidential information and should give full effect to the applicable legal professional privilege under Union or national law. Parties from whom disclosure is sought should be given the opportunity to be heard before a national court orders disclosure. Member states are explicitly allowed, however, to maintain or introduce rules that would lead to wider disclosure.¹⁴⁶³

More stringent protection is offered to evidence that is included in the file of a competition authority,¹⁴⁶⁴ for instance, a stronger proportionality test applies.¹⁴⁶⁵ An added requirement is that disclosure is only possible where no party or third party is reasonably able to provide the evidence.¹⁴⁶⁶ The use of such evidence is restricted in case it was obtained solely through access to the file.¹⁴⁶⁷ As the Damages Directive only provides for minimum harmonisation, these rules apply "*without prejudice to the rules and practices under Union or national law on the protection of internal documents of competition authorities and of correspondence between competition authorities.*"¹⁴⁶⁸ Additionally, the following categories of evidence in a competition authority's file enjoy protection until the closing of a competition authority's proceedings: information that was prepared by a natural or legal person specifically for the proceedings of a competition authority, information that the competition authority has drawn up and sent to the parties in the course of its proceedings, and withdrawn settlement submissions.¹⁴⁶⁹

<https://competitionpolicy.wordpress.com/2015/03/03/the-european-damages-directive-fails-to-deliver-but-can-it-be-fixed/>, (accessed November 2015).

¹⁴⁶² "(a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence; (b) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure; (c) whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information." Article 5(3) Damages Directive.

¹⁴⁶³ Article 5 Damages Directive.

¹⁴⁶⁴ Article 6(1) Damages Directive.

¹⁴⁶⁵ In addition to the factors mentioned in Article 5(3) Damages Directive, national courts should also consider whether the request has been formulated specifically with regard to the nature, subject matter or contents of documents submitted to a competition authority or held in the file thereof, rather than by a non-specific application concerning documents submitted to a competition authority; whether the party requesting disclosure is doing so in relation to an action for damages before a national court; and in certain circumstances the need to safeguard the effectiveness of the public enforcement of competition law.

¹⁴⁶⁶ Article 6 Damages Directive.

¹⁴⁶⁷ It can be used in an action for damages only by the person that obtained the information or by a natural or legal person that succeeded to that person's rights, including a person that acquired that person's claim. Article 7(3) Damages Directive.

¹⁴⁶⁸ Article 6(3) Damages Directive.

¹⁴⁶⁹ "However, the investigation in a given case must be regarded as closed once the final decision is adopted, irrespective of whether that decision might subsequently be annulled by the courts, because it is at that moment that the institution in question itself considers that the procedure has

According to PEYER, such categories likely encompass most relevant documents in the file of the competition authority. Evidence enjoying such temporary protection, obtained by a natural or legal person solely through access to the file of a competition authority is moreover either deemed to be inadmissible in actions for damages or is otherwise protected under the applicable national rules until a competition authority has closed its proceedings. This categorization has been criticised, as internal competition agency documents that have not been sent to the parties and therefore do not enjoy this temporary protection can nevertheless reveal strategies of the competition authorities. Documents gathered during inspections are therefore not blacklisted like leniency and settlement information (see below, Part II, 3.5.2.5). According to PEYER this is particularly surprising as companies under investigation are forced to surrender these documents.¹⁴⁷⁰ Finally, a distinction is made with regard to the passing on of overcharges either as a claim or a defence to a claim. In the latter case the Directive seems to allow a lower threshold of entitlement to discovery than in the main discovery provisions of Art. 5.¹⁴⁷¹

It can be concluded that while indeed information will be exchanged and will be subject to greater discoverability opportunities, safeguards are in place in both the EU-Switzerland Agreement and domestic legislation. This reinforces the legal security of would-be defendants, and ensures that information exchanges do not happen excessively or illicitly. Companies subject to an antitrust investigation or those considering to apply for leniency must take potential exposure to follow-on damages claims, and private litigation in general, into account. As such claims may be significantly higher than the total amount of fines imposed on them via public enforcement, undertakings have to consider carefully the interplay between their decision to cooperate with a competition authority and their ability to defend themselves properly in private litigation. Part of the analysis in this regard would be to identify the most likely claimants and the most likely jurisdictions for them to bring their claims, as well as the relevant national rules regarding access to documents and legal privilege. While indeed cooperation may in some instances harm a company's defence on the merits in follow-on damages claims, or lead to it being a primary target for damages actions, the nevertheless substantial benefits of leniency should not be fully overlooked. Moreover, many other factors are taken into account when deciding on whether or not to initiate actions for damages, such as litigation costs and the availability of specialised courts.¹⁴⁷² In any event, fear for foreign follow-on litigation should not be overstated.

3.5.1.4 Linked: concerns about leakage or misuse

An additional concern in this context is that confidential information, in particular business secrets, once exchanged, could end up in the public domain due to more lenient public access rules or imprudence in the receiving jurisdiction. Access of competitors to sensitive information could then

been completed." Judgment of 15 December 2011, *CDC Hydrogene Peroxide Cartel Damage Claims (CDC Hydrogene Peroxide) v European Commission*, T-437/08, EU:T:2011:752, paragraph 62.

¹⁴⁷⁰ S. Peyer, "Access to competition authorities' files in private antitrust litigation", *Journal of Antitrust Enforcement*, Vol. 3, No. 1, 2015, 80-82.

¹⁴⁷¹ C. Jones, "Into the parallel universe: procedural fairness in private litigation after the Damages Directive", 9th ASCOLA Conference Warsaw 2014 on Procedural Fairness in Competition Proceedings, Centre for Antitrust and Regulatory Studies, University of Warsaw, 26-28 June 2014, 10. See Articles 13 and 14 Damages Directive.

¹⁴⁷² "Strategic Considerations in cartel follow-on litigation", Concurrences Law & Economics Workshop, Brussels, 2 June 2016. In the US, qualitative research indicated that private litigation relating to cartels has not transformed the risk/reward-calculation for individuals within many companies and that incarceration and reduced civil penalties from government enforcement matter more than private enforcement. D. Daniel Sokol, "Cartels, corporate compliance, and what practitioners really think about enforcement", *Antitrust Law Journal*, Vol. 78, No. 1, 2012, 235.

cause additional commercial damage, apart from the damage caused by potential litigation.¹⁴⁷³ A Commission official stated that with regard to private antitrust litigation in the EU, international cooperation between competition agencies is mainly affected due to a fear of leakage of information rather than the private litigation as such, because the latter remains a complex issue and causality and quantification are difficult to establish.¹⁴⁷⁴ The perception exists that there is a high risk of leakage of trade secrets or business plans or the misuse of information that has been exchanged.¹⁴⁷⁵ American firms have even expressed fear that foreign competition authorities may intentionally disclose confidential information to potentially state-owned rival companies.¹⁴⁷⁶

Such concerns seem to stem from a lack of knowledge of the tasks and incentives of competition authorities as well as the functioning of the cooperation process. Competition authorities have every incentive to be careful with sensitive information, as it is in their own interest to ensure future cooperation with businesses. As WOOD stated: *“Those who think information cooperation is risky do not appreciate the restrictions on the uses to which information collected by the government for public enforcement proceedings can be put outside the litigation. The government does not turn over documents, depositions, or work product to any and every private plaintiff that walks along. [...] [T]his is just not the way the system works.”*¹⁴⁷⁷ Fears about leakage generally relate to concerns about exchanges with less-experienced jurisdictions without established safeguards in place, for instance relating to access to confidential and business sensitive material,¹⁴⁷⁸ but have no place when exchanges of information occur among experienced jurisdictions with similar standards.

Concerns surrounding leakage of information also appear to be founded in a general misconception regarding the prevalence of economic espionage.¹⁴⁷⁹ BIAC for instance emphasized that information is becoming a more and more important business asset, that is becoming increasingly vulnerable to hacking, espionage and other illegal practices to extract data.¹⁴⁸⁰ While no data are provided to back this claim up, it is moreover unclear how hacking and espionage would be made significantly easier when competition authorities exchange information under strict conditions and safeguards. It is not a valid argument against information exchanges in any event. There is no reason why the risk of leakage or undue use would be higher in competition cases than elsewhere. Senior Antitrust Division officials have confirmed that no leaks of information received from non-US firms have occurred and that such information is subject to the same protections under law as apply to information received from domestic sources.¹⁴⁸¹ Such concerns of leakage have no tangible basis as there is no evidence

¹⁴⁷³ OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Background Note, DAF/COMP/GF(2012)6, 13 February 2012, 27.

¹⁴⁷⁴ Interview with Commission official.

¹⁴⁷⁵ For instance for non-competition purposes.

¹⁴⁷⁶ International Competition Policy Advisory Committee Antitrust Division, ICPAC Final Report, 2000, available at <http://www.library.unt.edu/gpo/ICPAC/finalreport.htm> (accessed September 2015), Chapter 4.

¹⁴⁷⁷ D. Wood, “Is cooperation possible?”, Luncheon Speech, *New England Law Review*, Vol. 34, No. 1, 109-10.

¹⁴⁷⁸ International Competition Policy Advisory Committee Antitrust Division, ICPAC Final Report, 2000, available at <http://www.library.unt.edu/gpo/ICPAC/finalreport.htm> (accessed September 2015), Chapter 4.

¹⁴⁷⁹ M. Chowdhury, “From Paper Promises to Concrete Commitments: Dismantling the Obstacles to Transatlantic Cooperation in Cartel Enforcement”, American Antitrust Institute Working Paper No. 11-09, 28 November 2011, 18, fn 105.

¹⁴⁸⁰ OECD, Global forum on Competition, Improving international co-operation in cartel investigations, Contribution from BIAC, DAF/COMP/GF/WD(2012)57, 13 February 2012, 3.

¹⁴⁸¹ International Competition Policy Advisory Committee Antitrust Division, ICPAC Final Report, 2000, available at <http://www.library.unt.edu/gpo/ICPAC/finalreport.htm> (accessed September 2015), Chapter 4.

that leakage ever occurred.¹⁴⁸² Information is already being exchanged without stories of undue use. For instance, it happens that companies simultaneously seek leniency in several jurisdictions, and consent to the sharing of information between the competition authorities of these countries. Some competition authorities are even considering to make leniency conditional on waivers being granted by the applicant precisely because of their usefulness.¹⁴⁸³ Safeguards are in place, and their effectiveness is a necessity not just for the undertakings concerned but also for the agencies counting on the latter's cooperation.

3.5.2 Second concern: collapse of the leniency system

3.5.2.1 Important tool

Both the US and the EU significantly rely on their leniency policies for cartel detection. In the EU virtually all enforcement is done by the European Commission or national competition authorities rather than private litigants,¹⁴⁸⁴ and the leniency program is responsible for a large majority of cartels being uncovered.¹⁴⁸⁵ According to JONES the leniency policy is the most effective cartel detection and punishment tool available to the DoJ.¹⁴⁸⁶ According to one empirical study, the US leniency programme is responsible for a 42% cartel formation reduction and a 62% increase in cartel detection. The Amnesty Plus programme lies at the basis of half of the DoJ's international cartel investigations. This programme offers incentives for firms already under investigation for collusion to report another conspiracy in another market.¹⁴⁸⁷ Since 1996, over 90% of the fines for antitrust crimes in the US originate in investigations aided by leniency applicants, and over 50% of the international cartel investigations open at a given time are initiated or advanced by a leniency applicant.¹⁴⁸⁸

3.5.2.2 Fear of increased access to leniency information in private follow-on litigation

¹⁴⁸² M. Chowdhury, "From Paper Promises to Concrete Commitments: Dismantling the Obstacles to Transatlantic Cooperation in Cartel Enforcement", American Antitrust Institute Working Paper No. 11-09, 28 November 2011, 18-19. However, while leakage is certainly the exception, it is also difficult to prove that it happened and under whose responsibility: "Antitrust enforcers discussed the track record of their agencies with respect to leaks, and indicated that they have had no such occurrences." Panel on Current U.S. Bilateral Agreements, ICPAC Hearings (Nov. 2, 1998), Hearings Transcript at 106-160, in International Competition Policy Advisory Committee Antitrust Division, ICPAC Final Report, 2000, available at <http://www.library.unt.edu/gpo/ICPAC/finalreport.htm> (accessed September 2015), footnote 93.

¹⁴⁸³ OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Background Note, DAF/COMP/GF(2012)6, 13 February 2012, 22-23.

¹⁴⁸⁴ E. Elhauge & D. Geradin, *Global Competition Law and Economics*, 2nd ed., Oxford and Portland Oregon, Hart Publishing, 2011, 11.

¹⁴⁸⁵ Commission Staff Working Document "Ten years of antitrust enforcement under regulation 1/2003" accompanying the Communication from the Commission to the European Parliament and the Council "Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives", SWD/2014/0230 final, 9 July 2014, 8, figure 3; C. Nicolosi, "No Good Whistle Goes Unpunished: Can We Protect European Antitrust Leniency Applications from Discovery?", *Northwestern Journal of International Law & Business*, Vol. 31, No. 1, 2011, 234.

¹⁴⁸⁶ C. Jones, "The quality of mercy and the quality of justice: reflections on the discovery of leniency documents and private actions for damages in the European Union" in N. Charbit, E. Ramundo, A. Chetova & A. Slater (eds) *William E. Kovacic, An antitrust tribute, Liber Amicorum – Volume I*, New York, Institute of Competition Law, 2012, 247.

¹⁴⁸⁷ D. Daniel Sokol, "Cartels, corporate compliance, and what practitioners really think about enforcement", *Antitrust Law Journal*, Vol. 78, No. 1, 2012, 206.

¹⁴⁸⁸ C. Nicolosi, "No Good Whistle Goes Unpunished: Can We Protect European Antitrust Leniency Applications from Discovery?", *Northwestern Journal of International Law & Business*, Vol. 31, No. 1, 2011, 234.

Competition authorities fear that the incentive for companies to apply for leniency will greatly diminish if information that is submitted in the framework of a leniency programme would become discoverable in (mainly private) enforcement actions in other jurisdictions with whom information was shared. Moreover, if information is shared among authorities, the chance of submitted evidence being novel and useful diminishes and with this the chance of a successful leniency application if the applications are not done simultaneously. Even if the possibility of multiple successful leniency applications exists, firms might still choose not to cooperate, as financial savings in public fines might not outweigh having to pay private damages claims in multiple jurisdictions.¹⁴⁸⁹ Competition authorities have therefore voiced concern regarding the impact of information exchange among enforcers on their leniency systems. The Competition Committee of the OECD recognised that the effectiveness of amnesty programmes, and hard core cartel investigations more broadly, should not be inadvertently undermined by information exchanges and that for this reason many OECD member countries have a policy of not exchanging information obtained from an amnesty applicant without the applicant's prior permission.¹⁴⁹⁰ As stated by GUZMAN, participating in a leniency program of one jurisdiction means that a firm loses control over certain relevant information, which may increase the firm's risk of prosecution in another state.¹⁴⁹¹ The *Vitamins* case was the first occasion where private plaintiffs sought discovery of corporate statements submitted by a leniency applicant to the European Commission in a treble damages case before a US federal court.¹⁴⁹² A joint resolution was released by all ECN competition authorities to point out the importance of appropriate protection of leniency material in the context of civil damages actions.¹⁴⁹³ While it was a reaction to the aforementioned *Pfleiderer* case, which was an intra-EU case, it is also testimony of the importance competition authorities attach to discoverability of leniency information outside of the EU.

The European Commission has, with mixed success, protested firmly against discoverability of leniency information.¹⁴⁹⁴ It intervened in several US actions to protect information submitted under its leniency system, in order to safeguard the integrity of the latter,¹⁴⁹⁵ via an amicus curiae brief, a letter to the court, or a more active intervention. Arguments varied from the act of state doctrine, to investigatory privilege, or attorney work-product protection, but considerations of international

¹⁴⁸⁹ C. Jones, "The quality of mercy and the quality of justice: reflections on the discovery of leniency documents and private actions for damages in the European Union" in N. Charbit, E. Ramundo, A. Chetova & A. Slater (eds) *William E. Kovacic, An antitrust tribute, Liber Amicorum – Volume I*, New York, Institute of Competition Law, 2012, 246.

¹⁴⁹⁰ Opinion of Advocate General Mengozzi in *Archer Daniels Midland Co. v Commission of the European Communities*, C-511/06 P, EU:C:2008:604, paragraph 139.

¹⁴⁹¹ A. Guzman, "International competition law" in A. Guzman and A. Sykes (eds), *Research handbook in international economic law*, Cheltenham, Edward Elgar Publishing, 2007, 434.

¹⁴⁹² I. Vandenborre, "The confidentiality of EU Commission cartel records in civil litigation: the ball is in the EU Court", *European Competition Law Review*, Vol. 32, No., 3, 2011, 116.

¹⁴⁹³ ECN, Resolution of the Meeting of Heads of the European Competition Authorities of 23 May 2012, Protection of leniency material in the context of civil damages actions, available at http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf (June 2017).

¹⁴⁹⁴ To illustrate the importance of the leniency program to the European Commission: of the 52 Statements of Objection issued between 2002 and 2008, 46 were derived from information provided by leniency applicants. *Ibid.*, 248.

¹⁴⁹⁵ For instance in *Re: Vitamins Antitrust Litigation*, Misc. No. 99-197 (DDC, 2002); *Re: Vitamins Antitrust Litigation* 398 F. Supp. 2d 209, 226 (DDC, 2005); *Re: Methionine Antitrust Litigation*, No. C-99-3491, MDL no. 1311 (ND Cal. 2002); *Re: Air Cargo Shipping Services Antitrust Litigation* No 06 –MD-1775, 2009 WL 3077396 (EDNY, 2009) (first round of settlements); *Re: Air Cargo Shipping Services Antitrust Litigation* No 06-MD-1775, 2011 WL 2909163 (EDNY, 2011) (approval of nine further settlements); *Re: TFT-LCD (Flat Panel) Antitrust Litigation* No M 07-1827 SI, 2011 WL 723571 (ND Cal, 2011); *Rubber Chemicals Antitrust Litigation*, 486 F. Supp. 2d 1078 (ND Cal. 2007). The Commission was successful in the *Methionine* and *Rubber Chemicals* cases, but unsuccessful in the *Vitamins* case.

comity have generally taken a central place. No mention is made whatsoever, however, of the cooperation agreements concluded between the EU and the US. While these do not relate to exchange of confidential information, they do clearly put forward that the comity principle will be applied between the two parties. While the judiciary is independent and is not a party to these agreements, the latter nevertheless provides the context in which the competition authorities agreed to function. It is regrettable that the agreements are not used in this supportive manner.¹⁴⁹⁶

Apart from intervening in foreign proceedings, the Commission also allows for oral leniency applications to minimize the risk of discovery. The practice of oral statements was already informally allowed since 2002 exactly because of concerns regarding discovery in the US. In both the Commission's 2002 and 2006 Leniency Notices the Commission underlined its commitment to maintain as much as possible the confidentiality of leniency documents.¹⁴⁹⁷ The Commission in these notices stressed the importance of its leniency programme for anti-cartel enforcement, and stated that discovery possibilities in civil litigation should not discourage it. It considered that the public interest might be significantly harmed if potential leniency applicants are dissuaded from cooperating with the Commission out of fear this would impair their position in civil proceedings, compared to companies who do not cooperate. The 2006 Leniency Notice further clarified that only the addressees of a Statement of Objection receive access to leniency applications in the Commission's offices, without the right to make copies of these statements.¹⁴⁹⁸ The ECN Model Leniency Programme equally allows for oral applications in all cases where this would appear to be justified and proportionate. According to the Model Leniency Programme no access will be granted to any records of any oral statements before the Statement of Objections has been issued and the exchange of such records between authorities is limited to cases where the protections afforded to such records by the receiving authority are equivalent to those afforded by the transmitting authority.¹⁴⁹⁹

However, also in the case of oral applications, there is no guarantee that leniency information is entirely immune from discovery in the US.¹⁵⁰⁰ The written transcript of the oral statement is an internal Commission document which is not subject to discovery. The applicant will not be in the possession of any document detailing its corporate statement, which it could be ordered to produce in private litigation.¹⁵⁰¹ This fact is particularly relevant in case the investigatory privilege is invoked, the application of which rests on the fact that the privileged information is only in the control of an

¹⁴⁹⁶ I. Vandenborre, "The confidentiality of EU Commission cartel records in civil litigation: the ball is in the EU Court", *European Competition Law Review*, Vol. 32, No., 3, 2011, 116, 118.

¹⁴⁹⁷ "in the 2002 version [...] the Commission made it clear that any statement received by it in relation to that notice could not be disclosed or used for any purpose other than the enforcement of Article 81 EC, whilst in the 2006 version [...] it made clear that such statements may be transmitted, under certain conditions, only to the competition authorities of the Member States. In both versions of that notice (paragraphs 32 and 40 respectively), it is pointed out that the disclosure of such statements undermines protection of the objectives of inspections and investigations within the meaning of Article 4(2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43)." Opinion of Advocate General Mengozzi in *Archer Daniels Midland Co. v Commission of the European Communities*, C-511/06 P, EU:C:2008:604, footnote 96

¹⁴⁹⁸ Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, 08.12.2006, paragraph 6, 32-34.

¹⁴⁹⁹ Commission Staff Working Paper SEC(2009)574 accompanying the Communication from the Commission to the European Parliament and Council Report on the functioning of Regulation 1/2003 COM(2009)206 final, 29 April 2009, 69-70.

¹⁵⁰⁰ For a detailed analysis of the risk oral applications face, see A. Petrasincu, "Discovery revisited – the impact of the US discovery rules on the European Commission's leniency programme", *European Competition Law Review*, Vol. 32, No. 7, 2011, 365-69.

¹⁵⁰¹ I. van Bael, *Due process in EU competition proceedings*, Alphen aan den Rijn, Wolters Kluwer, 2011, 271.

investigative body, and not in the possession of a private party. In case a defendant has prepared its own transcript, however, the privilege would arguably not apply to protect this document. Indeed, the Commission's oral leniency procedure does not necessarily protect the applicant against a claim for production of the written materials that form the basis of the oral statement in the latter's possession.¹⁵⁰² Additional protection is therefore only present in the event that the oral leniency application is not based on an advanced draft, which rarely occurs. In any event, the identity of the leniency applicants and a description of their participation in the cartel will inevitably be disclosed to greater or lesser extent in the final decision of the Commission.¹⁵⁰³ Moreover, it is possible that private plaintiffs make the argument, and US judges require "*that a leniency applicant make a 'good faith effort' to comply with a discovery request by asking the Commission to produce a transcript of its corporate statement.*"¹⁵⁰⁴

3.5.2.3 Fear is overstated

In the *Payment Card Interchange Fee and Merchant Discount Antitrust Litigation (Interchange case)* production was requested of a Statement of Objections issued to Visa and a recording of a MasterCard Oral Hearing. Visa and MasterCard were the defendants in the US class action, while the plaintiffs were merchants in the US who accepted Visa and MasterCard payment cards.¹⁵⁰⁵ The District Court for the Eastern District of New York in 2010 referenced the aforementioned *Aerospatiale* comity balancing test, "*noting that the plaintiffs had other means of obtaining information about the defendants activities in Europe and already had access to one of the defendants' submissions to the Commission.*"¹⁵⁰⁶ The Commission had also filed an amicus brief objecting to the disclosure.¹⁵⁰⁷ The District Court therefore ruled that the confidential documents prepared by DG COMP were not discoverable in US antitrust litigation, in contrast to the magistrate judge's decision that had compelled production. Disclosure was considered to seriously undermine the Commission's enforcement practice and the importance of confidentiality was underlined in obtaining the voluntary cooperation of third parties, but also in encouraging fuller, more open, and more sincere participation in compelled participation.¹⁵⁰⁸

A letter of the Deputy Assistant Attorney General for Criminal Enforcement in the *Flat Glass Antitrust Litigation* held that "[m]any leading members of the private antitrust bar who represent leniency applications have advised... that the Division's promise of confidentiality is a critical, and in some cases determinative, factor that companies rely upon in making the decision to self-report pursuant to the Division's leniency program."¹⁵⁰⁹ While it is plausible that the prospect of increased civil liability would deter leniency applications, JONES claimed that there is no reported evidence of this being the case, and ample experience in the

¹⁵⁰² I. Vandenborre, "The confidentiality of EU Commission cartel records in civil litigation: the ball is in the EU Court", *European Competition Law Review*, Vol. 32, No., 3, 2011, 121.

¹⁵⁰³ I. van Bael, *Due process in EU competition proceedings*, Alphen aan den Rijn, Wolters Kluwer, 2011, 272.

¹⁵⁰⁴ *Ibid.*, 120.

¹⁵⁰⁵ ECN Brief, "European Commission: Recent Developments on Discovery following Amicus Curiae", http://ec.europa.eu/competition/ecn/brief/04_2010/com_discovery.pdf (accessed June 2017).

¹⁵⁰⁶ I. Vandenborre, "The confidentiality of EU Commission cartel records in civil litigation: the ball is in the EU Court", *European Competition Law Review*, Vol. 32, No., 3, 2011, 119.

¹⁵⁰⁷ X., "US Court Rules That Confidential European Commission Documents Are Not Discoverable in US Antitrust Litigation", *Cleary Gottlieb Alert Memo*, 14 September 2010.

¹⁵⁰⁸ ECN Brief, "European Commission: Recent Developments on Discovery following Amicus Curiae", http://ec.europa.eu/competition/ecn/brief/04_2010/com_discovery.pdf (accessed June 2017).

¹⁵⁰⁹ Letter of S. Hammond, Deputy Assist. Att'y Gen. For Crim. Enf., Antitrust Div., Dep't of Justice, In re Flat Glass Antitrust Litig., No. 08-180 (Doc. No. 200-6), 6 October 2009, 3.

US demonstrating that it is not.¹⁵¹⁰ Similarly, in the *CDC Hydrogen Peroxide* case, CDC claimed that there was no causal link between disclosure of the statement of contents in that case, on the one hand, and the danger to the Commission's task of preventing anti-competitive practices, on the other. It emphasised that the number of requests for immunity was not decreasing notwithstanding an increase in the number of actions for damages.¹⁵¹¹ It is indeed plausible that declarations of alleged cartelists suggesting to the Commission that cartel members would be less likely to participate in leniency programmes if they have to incur the expense of private damages litigation or payment of judgments or settlements, are to be considered as threats or negotiating positions.¹⁵¹² There is no proof that the exchange of leniency information would have an impact on the number of leniency applications in a negative way. The argument that undertakings would be deterred from reporting infringements can moreover be opposed to the fact that compensations for loss caused by anticompetitive behaviour also significantly contribute to the maintenance of effective competition in the EU.¹⁵¹³

If the risk of the leniency system being undermined exists, it does so regardless of information exchange among enforcers.¹⁵¹⁴ One of the conclusions of the ICN's Working Group on Cartels was that fear of civil damages actions was only one factor among many in deciding whether or not to apply for leniency.¹⁵¹⁵ General divergences or contradictions between the leniency programmes of different jurisdictions may also discourage the use of such programmes.¹⁵¹⁶ It must not be forgotten either that protection from civil liability was never a goal of the EU leniency system,¹⁵¹⁷ even though it was developed at a time where private enforcement in the EU was virtually non-existent. The Leniency Notice explicitly states that leniency does not imply protection from the civil consequences of participation in a cartel.¹⁵¹⁸ Allowing otherwise would undermine the case-law of *Courage* and

¹⁵¹⁰ C. Jones, "The quality of mercy and the quality of justice: reflections on the discovery of leniency documents and private actions for damages in the European Union" in N. Charbit, E. Ramundo, A. Chetova & A. Slater (eds) *William E. Kovacic, An antitrust tribute, Liber Amicorum – Volume I*, New York, Institute of Competition Law, 2012, 256.

¹⁵¹¹ Judgment of 15 December 2011, *CDC Hydrogene Peroxide Cartel Damage Claims (CDC Hydrogene Peroxide) v European Commission*, T-437/08, EU:T:2011:752, paragraph 54.

¹⁵¹² C. Jones, "The quality of mercy and the quality of justice: reflections on the discovery of leniency documents and private actions for damages in the European Union" in N. Charbit, E. Ramundo, A. Chetova & A. Slater (eds) *William E. Kovacic, An antitrust tribute, Liber Amicorum – Volume I*, New York, Institute of Competition Law, 2012, 258.

¹⁵¹³ Judgment of 28 January 2015, *Akzo Nobel NV and Others v European Commission*, T-345/12, EU:T:2015:50, paragraph 82-84.

¹⁵¹⁴ It is telling, for instance, that a 2016 Law & Economics Workshop organised by Concurrences on 'Strategic Considerations in cartel follow-on litigation', did not state anything relating to cooperation between competition agencies. Concurrences Law & Economic Workshop "Strategic Considerations in cartel follow-on litigation", Brussels, 2 June 2016.

¹⁵¹⁵ ICN Cartels Working Group, Interaction of Public and Private Enforcement in Cartel Cases, Report to the ICN Annual Conference, Moscow, May 2007, 43.

¹⁵¹⁶ Such as the requirements as to how the facts should be established by the applicant, incompatible timelines, inconsistent approaches regarding marker policies, the extent of the jurisdictional nexus required to trigger an investigation, and the predictability of both the recognition of the contribution of second and subsequent applicants and the calculation of reductions and sanctions. OECD, Global forum on Competition, Improving international co-operation in cartel investigations, Contribution from BIAC, DAF/COMP/GF/WD(2012)57, 13 February 2012, 3-5.

¹⁵¹⁷ JONES emphasised the difference between the EU and US leniency programmes, and their relationship with private litigation, underlining that in the US the DoJ requires that, where possible, leniency applicants make restitution to victims as an express condition of receiving leniency. (C. Jones, "The quality of mercy and the quality of justice: reflections on the discovery of leniency documents and private actions for damages in the European Union" in N. Charbit, E. Ramundo, A. Chetova & A. Slater (eds) *William E. Kovacic, An antitrust tribute, Liber Amicorum – Volume I*, New York, Institute of Competition Law, 2012, 256.)

¹⁵¹⁸ Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C 298, 08.12.2006, recital 39.

Manfredi that victims of anticompetitive conduct have a right to compensation.¹⁵¹⁹ It is pivotal to find an appropriate balance between protecting the effectiveness of cartel detection and prosecution and allowing the victims of a cartel to pursue restitution.¹⁵²⁰

There are some econometric arguments in support of the exchange of leniency information among antitrust authorities as well. CHOI and GERLACH explored the relationship between international competition coordination, cartel formation and the effectiveness of leniency programs, using repeated price game theory. In the first scenario antitrust authorities do not coordinate or share any information. In the second scenario the agencies do share information, but exclude all information that was obtained in the course of a leniency program. In the final scenario extensive information sharing is considered, including information from leniency applications. No distinction is made between the corporate statement and pre-existing information. They discovered that in the first scenario, it is easier for global firms to sustain a cartel compared to local firms, and they will self-report less often. Leniency programs will therefore function less well in these circumstances, mainly due to the possibility of partial self-reporting-strategies. In the second scenario there is a higher chance of cartel detection and a higher chance of successful convictions in each relevant jurisdiction compared to scenario one, which results in higher self-reporting-rates and less scope for cartel formation. In the third scenario firms will either conceal the cartel from all relevant authorities, or reveal the cartel to all. The result depends on the height of the antitrust fine and the conviction probability. If both are low-to-medium, firms will not self-report. The result of this simulation is that for cartels that are active in jurisdictions such as the EU and the US, which impose high fines and have a relatively high conviction probability, firms will apply for leniency in all relevant jurisdictions.¹⁵²¹

Another reason why information exchange among competition authorities via second generation agreements should not serve as a disincentive to apply for leniency is that an increasing number of companies grant waivers of confidentiality during the leniency process, meaning that information is already being shared without negative consequences.¹⁵²² JONES pointed to the fact that despite the Commission's assertions in its Leniency Notice that it intends to guard leniency submissions so that cooperating cartel members will be no worse off in private litigation than they would be if they did not cooperate, "*the fact that leniency recipients are found to be infringers in Commission decisions is a negative consequence of applying for leniency as compared to not applying, so if fear of civil liability were a deterrent to leniency applications, they would already be deterred under current practice.*"¹⁵²³ HAMMOND, former Deputy Assistant Attorney General US DoJ, underlined the importance of waivers in a speech in 2003, a period in which an increasing number of jurisdictions were considering adopting leniency policies. He stated that simultaneous leniency applications had become 'the norm' in many major jurisdictions, and that applicants 'commonly' waive confidentiality rights between the jurisdictions where they applied for

¹⁵¹⁹ Judgment of 20 September 2001, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, C-453/99, EU:C:2001:465; Judgment of 13 July 2006, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v Fondiaria Sai SpA and Nicolò Tricarico and Pasqualina Murgolo v Assitalia SpA*, Joined cases C-295/04 to C-298/04, EU:C:2006:461.

¹⁵²⁰ OECD, Global Forum on Competition, Improving international co-operation in cartel investigations, Contribution from the European Union, DAF/COMP/GF/WD(2012)53, 9 February 2012, 6.

¹⁵²¹ J.P. Choi & H. Gerlach, "Global cartels, leniency programs and international antitrust cooperation", *International journal of industrial organization*, Vol. 30, No. 6, 2012, 529.

¹⁵²² M. Chowdhury, "From paper promises to concrete commitments: Dismantling the obstacles to transatlantic cooperation in cartel enforcement", AAI Working Paper No. 11-09, November 28, 2011, 15.

¹⁵²³ C. Jones, "The quality of mercy and the quality of justice: reflections on the discovery of leniency documents and private actions for damages in the European Union" in N. Charbit, E. Ramundo, A. Chetova & A. Slater (eds) *William E. Kovacic, An antitrust tribute, Liber Amicorum – Volume I*, New York, Institute of Competition Law, 2012, 256.

leniency.¹⁵²⁴ This was confirmed in the contribution from the US to the 2012 Global Forum on Competition where it was stated that waivers are ‘routinely’ obtained from applicants in the case of simultaneous leniency applications.¹⁵²⁵ Even in the event that these statements are exaggerated or enhanced, the fact that some level of exchange already takes place, adds to the argument that fears about the risks of such exchanges are inflated.

3.5.2.4 Safeguards in the EU-Switzerland Agreement

Despite the above arguments, the EU-Switzerland Agreement foresees that discussion or exchange of leniency information without express consent in writing of the undertaking providing the information is not allowed.¹⁵²⁶ ‘Leniency information’ in the EU-Switzerland Agreement means for the Union, information obtained pursuant to the Commission notice on immunity from fines and reduction of fines in cartel cases, and information obtained pursuant to Article 10a of Commission Regulation No 773/2004. For Switzerland, this refers to information obtained pursuant to paragraph 2 of Article 49a CartA and Articles 8 to 14 of the 2004 Ordinance on Sanctions Imposed for Unlawful Restraints of Competition, and information obtained pursuant to Article 29 CartA.¹⁵²⁷ Protection therefore seems to apply to all leniency information, the voluntarily provided leniency statement itself as well as evidence that the leniency applicant has submitted together with the actual leniency application.¹⁵²⁸ However, it is reported that “[a]ccording to one of the Directors of the Secretariat of COMCO who took part in the negotiations of the Cooperation Agreement, this limitation covers only the leniency declaration itself and not the supporting evidence such as e-mails, correspondence, minute [sic] of meetings, etc. which may be communicated without the consent of the undertaking.”¹⁵²⁹ DUCREY, a member of the Swiss delegation that negotiated the Agreement, equally clarified that only the leniency report itself is given special protection, not evidence that was submitted at the same time or that can also be obtained in the course of a search.¹⁵³⁰ It is regrettable that the text of the Agreement is not more clear on this matter. It is unclear as well what would happen if a leniency application is withdrawn, or when it was late or incomplete.¹⁵³¹ The US-Australia Agreement nor the IAEAA foresee a formal limitation on the use

¹⁵²⁴ S. Hammond, “Beating cartels at their own game – sharing information in the fight against cartels”, presented at the Inaugural Symposium of the Competition Policy Research Center - Fair Trade Commission of Japan, Tokyo, 20 November 2003, as cited in OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Background Note, DAF/COMP/GF(2012)6, 13 February 2012, 22.

¹⁵²⁵ OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Contribution from the United States (DoJ), DAF/COMP/GF/WD(2012)46, 31 January 2012, 6.

¹⁵²⁶ Article VII(6) EU-Switzerland Agreement.

¹⁵²⁷ Article 2(7) and 2(8) EU-Switzerland Agreement.

¹⁵²⁸ F. Hoffet, M. Dietrich, G. Brei, “Cooperation Agreement Switzerland – EU on Competition Law becomes effective on 1 December 2014, Facilitation of the Transmission of Confidential Information and Documents between Swiss and European Competition Authorities”, *Homburger Bulletin*, 6 November 2014, available at http://www.homburger.ch/fileadmin/publications/Homburger_Bulletin_20141106_EN.PDF (accessed August 2016), 3.

¹⁵²⁹ P. Kobel & D. Viros, “Cooperation Agreement – Investigations – Confidentiality obligations: The European Union and Switzerland reach the agreement concerning the application of their competition law entering in force on 1st December 2014”, *Concurrences*, N° 2- 2015, 212.

¹⁵³⁰ P. Ducrey, “The Agreement between Switzerland and the EU concerning cooperation in the Application of their competition laws”, *Journal of European Competition Law & Practice*, Vol. 4, No. 5, 2013, 442.

¹⁵³¹ M. Meinhardt & B. Merkt, “Cooperation Agreement between Switzerland and the EU on competition law enters into force”, *Lexology*, 14 November 2014.

or disclosure of leniency information, but it is US policy to treat such information with care.¹⁵³² It is unfortunate that this policy was not formalised in the Agreement.¹⁵³³

Settlement information is protected in the same manner as leniency information, although it is difficult to understand how this protection would apply in practice.¹⁵³⁴ As a settlement can occur at several stages of the procedure, it is not clear what happens with information that was discussed or transmitted prior to the settlement. Furthermore, one cannot deduct from the provision whether it is the initiation of settlement talks that restricts the possibility of discussions and transmissions, or only the signature of the settlement agreement, as settlement negotiations can come to halt before their finalization.¹⁵³⁵

3.5.2.5 Safeguards in domestic legislation

In most major jurisdictions around the world, leniency applicants in competition investigations do not receive any beneficial treatment in follow-on private antitrust cases, but there are some exceptions. In the US, for instance, leniency applicants can still face private litigation, but they are exempted from joint and several liability or triple damages (they are only held liable for restitution of actual damages) if the relevant court determines that the applicant has satisfied its cooperation obligations. Beneficial treatment is limited, however, as an applicant's criminal plea or conviction following public enforcement may serve as prima facie evidence of the violation in a subsequent private action.¹⁵³⁶

If leniency information is nevertheless transmitted to the EU, it is protected via the aforementioned Damages Directive. This legislation was particularly welcomed by the Commission, which was burdened by the permanent need to monitor and follow-up on for instance US federal district court proceedings, intervening to call for the application of principles of comity on a case-by-case basis to counter the perceived negative effects of extraterritorial discovery of leniency documents.¹⁵³⁷ Under Article 6(6) of the Damages Directive leniency statements and settlement submissions enjoy permanent protection from disclosure for the purpose of damages actions.¹⁵³⁸ 'Leniency statement' is defined as *"an oral or written presentation voluntarily provided by, or on behalf of, an undertaking or a natural person to a competition authority or a record thereof, describing the knowledge of that undertaking or natural person of a cartel and describing its role therein, which presentation was drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme, not including pre-*

¹⁵³² The DOJ in its contribution to the OECD Global Forum on Competition 'improving international co-operation in cartel investigations' stated that leniency information is protected and cannot be exchanged unless there is a court order present (corporate leniency) or a waiver has been provided (individual leniency: *"The DOJ's policy is to treat as confidential the identity of leniency applicants and any information obtained from the applicant. The DOJ will not disclose a leniency applicant's identity, absent prior disclosure by or agreement with the applicant, unless authorized by court order. Further, in order to protect the integrity of the leniency program, the DOJ has adopted a policy of not disclosing to other authorities, pursuant to cooperation agreements, information obtained from a leniency applicant unless the leniency applicant agrees first to the disclosure."*(OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Contribution from the United States (DoJ), DAF/COMP/GF/WD(2012)46, 31 January 2012, 6.)

¹⁵³³ 15 USC Section 6211(2).

¹⁵³⁴ Article 7(6) EU-Switzerland Agreement.

¹⁵³⁵ D. Mamane, "Competition law cooperation agreement EU/Switzerland", *Kluwer Competition Law Blog*, 31 July 2012.

¹⁵³⁶ Global Competition Review, Know-How, Topics, private litigation, <http://globalcompetitionreview.com/> (accessed January 2015).

¹⁵³⁷ C. Nicolosi, "No Good Whistle Goes Unpunished: Can We Protect European Antitrust Leniency Applications from Discovery?", *Northwestern Journal of International Law & Business*, Vol. 31, No. 1, 2011, 247.

¹⁵³⁸ Article 6(6) Damages Directive.

existing information.”¹⁵³⁹ The latter in turn is defined as “evidence that exists irrespective of the proceedings of a competition authority, whether or not such information is in the file of a competition authority.”¹⁵⁴⁰ A leniency corporate statement includes a detailed description of the facts of the infringement. Such statements are drawn up specifically for submission to the Commission to benefit from the leniency programme. Via this statement the author admits the infringement and waives his right not to incriminate himself.¹⁵⁴¹ It is therefore rightly differentiated from other documents provided to the Commission in the course of an investigation, in particular pre-existing information.¹⁵⁴² A ‘settlement submission’ is understood to be “a voluntary presentation by, or on behalf of, an undertaking to a competition authority describing the undertaking’s acknowledgement of, or its renunciation to dispute, its participation in an infringement of competition law and its responsibility for that infringement of competition law, which was drawn up specifically to enable the competition authority to apply a simplified or expedited procedure.”¹⁵⁴³ The protection granted therefore applies to leniency statements and settlement submissions *sensu strictu*, as well as verbatim quotations from leniency statements or settlement submissions included in other documents.¹⁵⁴⁴ Leniency statements and settlement submissions in the hands of third parties are further protected in Article 7, which restricts the use of such evidence when it was obtained by a natural or legal person solely through access to the file of a competition authority. In this case the evidence is either deemed to be inadmissible in damages actions or is otherwise protected under the applicable national rules.¹⁵⁴⁵ It should be noted that Swiss law does not include any similar provision preventing undertakings from using the leniency statements and settlement submissions transmitted by the EU Commission in civil proceedings.¹⁵⁴⁶ The Damages Directive provides even more protection to leniency recipients by lowering the risk they face of being held jointly and severally liable to injured parties other than direct or indirect purchasers as claimants will have to sue other infringers in the same case first before being able to request full compensation from the leniency recipient(s).¹⁵⁴⁷

This protection does not prevent competition authorities from publishing their decisions in accordance with the applicable legislation. In the EU, the Commission can publish leniency information, without however including information that could lead to the identification of the leniency applicant(s).¹⁵⁴⁸ According to Advocate General SZPUNAR in the aforementioned *Evonik* appeal case, the protection of leniency statements is justified by the public interest in ensuring that the leniency programmes remain attractive, and therefore cannot be relied on against the Commission. However, protection may also find its basis in the particular interest of the leniency applicant because of the way in which the leniency programmes function. The fact that it creates a legal framework which encourages an undertaking to spontaneously waive its right not to incriminate

¹⁵³⁹ Article 2(16) Damages Directive

¹⁵⁴⁰ Article 2(17) Damages Directive.

¹⁵⁴¹ Opinion of Advocate General Szpunar in *Evonik Degussa GmbH v European Commission*, C-162/15, EU:C:2016:587.

¹⁵⁴² Article 4(a) Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004.

¹⁵⁴³ Article 2(18) Damages Directive.

¹⁵⁴⁴ Recital 26 Damages Directive.

¹⁵⁴⁵ Article 7(1) Damages Directive.

¹⁵⁴⁶ P. Kobel & D. Viros, “Cooperation Agreement – Investigations – Confidentiality obligations: The European Union and Switzerland reach the agreement concerning the application of their competition law entering in force on 1st December 2014”, *Concurrences*, N° 2- 2015, 214.

¹⁵⁴⁷ Article 11(4) Damages Directive, also see S. Peyer, Peyer, Sebastian, “The European Damages Directive fails to deliver, but can it be fixed?”, *ESRC Centre for Competition Policy Competition Law and Policy Blog*, 3 March 2015.

¹⁵⁴⁸ Judgment of 28 January 2015, *Akzo Nobel NV and Others v European Commission*, T-345/12, EU:T:2015:50, paragraph 109.

itself creates a relationship based on trust between the applicant and the Commission.¹⁵⁴⁹ While the Advocate General therefore accepted that there exists a legitimate expectation from the relevant undertaking that it will receive confidential treatment, this is limited to the “*disclosure of the information obtained within the framework of cooperation in a context which enables the source of the information to be traced, and does not apply to the protection of that information as such.*”¹⁵⁵⁰ He explained that it is not the intrinsically sensitive content of the leniency information that justifies protection, but rather the combination of the content and the circumstances in which the information was communicated to the Commission. This in turn justifies that the restrictions on disclosure resulting from the legitimate interest of the leniency applicant apply *only* to the information that enables the connection with the leniency statement to be identified. While the case dates back prior to the Damages Directive, the Advocate General did make reference to it. According to him, the full protection afforded to leniency statements does not automatically mean that factual information concerning the infringement contained in those statements merits the same level of protection when the Commission’s decisions are published. This is justified by the fact that public access to information relating to the unlawful facts is a fundamental element of actions for damages. According to AG SZPUNAR the extension of absolute protection to such information would upset the delicate balance established by the Damages Directive. Such protection can moreover not be inferred from the Directive in the absence of any express provision to that effect, on the contrary, the Directive specifically states that the limitations on the disclosure of evidence should not prevent the competition authorities from publishing their decisions in accordance with the applicable EU or national law (recital 26). The Advocate General concluded that the information in leniency statements may be used in the public versions of Commission decisions, provided that identification of the source is made impossible, and the legitimate expectation of the applicant to confidential treatment only extends to the protection of the statement as such, of the verbatim quotations and other information that would permit that statement to be directly identified as the source, but not of factual information relating to the infringement. He finally, and rightly so, pointed out that the interests of leniency applicants are also protected by other means that are less harmful to the interests of injured third parties, for instance via the limitation of joint and several liability of leniency applicants.¹⁵⁵¹ Such an approach is preferable to one that restricts access to leniency documents as it reconciles to a certain extent both the functioning of leniency programmes and the right to compensation of damages as recognised by the ECJ.¹⁵⁵²

The Court confirmed the Advocate General’s assessment, clarifying that while verbatim quotations, of information from the documents provided by an undertaking to the Commission in support of a statement made in order to obtain leniency should be allowed to be published, subject to compliance with the protection owed to business secrets, professional secrecy and other confidential information, the publication of verbatim quotations from that statement itself is not to be published in any circumstances.¹⁵⁵³ It further added that an undertaking cooperating with the Commission in the context of a proceeding under Article 101 TFEU can only rely on “*the protection concerning (i) the immunity from or reduction in the fine in return for providing the Commission with evidence of the suspected infringement which represents significant added value with respect to the information already in its possession and (ii)*

¹⁵⁴⁹ Opinion of Advocate General Szpunar in *Evonik Degussa GmbH v European Commission*, C-162/15, EU:C:2016:587, paragraph 119-122.

¹⁵⁵⁰ Ibid., paragraph 123. Emphasis by author.

¹⁵⁵¹ Ibid., paragraph 124-125, 203-208.

¹⁵⁵² J. Alfaro & T. Reher, “Towards the Directive on Private Enforcement of EC Competition Law: is the time ripe?”, *The European Antitrust Review*, 2010, 44.

¹⁵⁵³ Judgment of 14 March 2017, *Evonik Degussa GmbH v European Commission*, C-162/15 P, EU:C:2017:205, paragraph 87.

the non-disclosure by the Commission of the documents and written statements received by it in accordance with the 2002 Leniency Notice.”¹⁵⁵⁴ The Court therefore clarified that the case-law relating to the Transparency Regulation cannot be relied upon to contest the publication of information in an infringement decision. It finally stated that the appellant’s argument regarding the protection of the leniency programme’s effectiveness does not cast doubt on the foregoing considerations.¹⁵⁵⁵ The Commission therefore enjoys a broad margin of discretion in determining what information will be disclosed in the public version of an infringement decision.

The Directive provides more legal certainty for firms that cooperate with competition authorities, compared to the aforementioned *Pfleiderer* and *Donau Chemie* case-law. PEYER, however, stated that the pendulum is now on the other end and that rather than reducing litigation costs or incentivising legal action, thereby achieving the stated goal of compensation, the Directive rather seeks to safeguard public enforcement from private follow-on actions.¹⁵⁵⁶ In this sense, information exchanged with the European Commission does not contribute to a higher risk of liability in private enforcement as the Damages Directive in fact attempts to maintain the incentives for companies to cooperate with competition authorities. The Damages Directive installs an entirely inflexible assessment when it comes to leniency statements and settlement submissions, which seems ill-suited for the multiple complex competing interests under EU law.¹⁵⁵⁷ However, only the corporate statement is protected, and claimants in follow-on cases are aided by the fact that NCA’s final infringement decisions are considered binding, and more generally cartel harm and passing-on is presumed.¹⁵⁵⁸

In the US, the DoJ’s leniency program does not protect cartel participants from civil damages actions either. Regardless of leniency, court judgments obtained by the DoJ serve as *prima facie* proof of a violation in a Federal court and can serve as the basis for private treble damages claims under the Sherman Act. Moreover, if an undertaking succeeds in its leniency application, it is obliged to provide restitution to victims where possible. Relief from a treble-damages verdict (e.g. single damages without joint and several liability) by a leniency recipient is possible under the Antitrust Criminal Penalties and Enforcement Reform Act (2004), only if it has fully cooperated with the plaintiffs in the damages action, separate from any cooperation given to the DoJ.¹⁵⁵⁹ The US similarly pursues a policy of not disclosing the identity of leniency applicants or materials or statements created or made in connection with a leniency application.¹⁵⁶⁰ The DoJ bases this policy on the reasoning that corporations or individuals will not plead guilty voluntarily if their request and the information they supply is made public, but they rather expect such discussions to remain confidential. Protection is, however, equally limited to documents that have been specially created –

¹⁵⁵⁴ Ibid., paragraph 97.

¹⁵⁵⁵ Ibid., paragraph 100.

¹⁵⁵⁶ S. Peyer, Peyer, Sebastian, “The European Damages Directive fails to deliver, but can it be fixed?”, *ESRC Centre for Competition Policy Competition Law and Policy Blog*, 3 March 2015.

¹⁵⁵⁷ C. Jones, “The quality of mercy and the quality of justice: reflections on the discovery of leniency documents and private actions for damages in the European Union” in N. Charbit, E. Ramundo, A. Chetova & A. Slater (eds) *William E. Kovacic, An antitrust tribute, Liber Amicorum – Volume I*, New York, Institute of Competition Law, 2012, 252.

¹⁵⁵⁸ Recital 34, Article 13, Article 17(2) Damages Directive.

¹⁵⁵⁹ C. Jones, “The quality of mercy and the quality of justice: reflections on the discovery of leniency documents and private actions for damages in the European Union” in N. Charbit, E. Ramundo, A. Chetova & A. Slater (eds) *William E. Kovacic, An antitrust tribute, Liber Amicorum – Volume I*, New York, Institute of Competition Law, 2012, 248.

¹⁵⁶⁰ Global competition review, know-how, topics, private litigation, <http://globalcompetitionreview.com/> (accessed January 2015). See footnote 1532 above.

or statements that have been specifically made – in connection with a leniency application.¹⁵⁶¹ With regard to discovery of *foreign* leniency-information, not belonging to the US authorities' file, uncertainty remains with regard to the ability of the US or a foreign government to protect such materials from discovery in US damages litigation. There is no explicit rule that would clearly protect foreign leniency information. Instead, defendants and governments looking to protect leniency information from discovery in US civil proceedings must rely on ambiguous doctrines, such as comity, the doctrine of foreign or investigatory privilege, or even the act of state doctrine. As these doctrines require a balancing of interests and therefore cannot offer a guarantee of protection, it deprives parties of pre-litigation certainty. US courts have indeed not reached consistent conclusions in cases where antitrust plaintiffs seek discovery of material produced for or generated in an EU cartel proceeding. However, because sovereigns are more aggressively pursuing their interest in protecting confidentiality by intervening as *amicus curiae*, courts may be growing more sensitive to the risk posed by such discovery demands.¹⁵⁶²

3.5.2.6 Over-protection of leniency programmes?

Leniency appears to be almost unique to competition law. Equivalent enforcement instruments are difficult to trace in other branches of law, but more than fifty jurisdictions have included a leniency policy in one form or another in their competition law enforcement system. The leniency policy is an instrument often zealously defended and advocated for by enforcers, and sometimes triggering defensive reactions in the face of criticism or perceived threats to the functioning of the programme. However, while the impact of leniency programmes should not and cannot be understated, they should not be treated as the holy grail. An increasing amount of questions emerges concerning their long term sustainability and effectiveness, in particular with regard to the effects of leniency policies on other aspects of the enforcement system, such as private actions, settlements, as well as international cooperation.¹⁵⁶³ The question whether the benefits of the leniency program are indeed worth the cost is increasingly raised.¹⁵⁶⁴ In recent years the apparent over-reliance on leniency policies and myopia in their use is questioned and attention is drawn to the potentially deleterious effects of such policies. Empirical research and practical experience increasingly cast doubt on the extent to which leniency policies actually contribute to cartel deterrence. Some studies have even pointed to the perverse effect of leniency policies promoting cartel activity rather than deterring it.¹⁵⁶⁵

Empirical research conducted by SOKOL indicated that firms regularly game the leniency program to punish their competitors. Economic literature suggests that if leniency is granted too easily, this may create incentives for strategic behaviour, whereby firms use the leniency program to punish rivals or to help enforce collusion. SOKOL furthermore pointed to the fact that leniency in a competition law context as it exists now is relatively unusual in terms of its detection ability for enforcers vis-à-vis other types of white-collar crime, in that what counts as 'leniency' may give the leniency program too much credit. Sometimes firms may apply for leniency when the cartel is already in the process of

¹⁵⁶¹ S.R. Miller, K. Nordlander, J.C. Owens, "U.S. discovery of European Union and U.S. leniency applications and other confidential investigatory materials", *CPI Antitrust Journal*, March 2010, 3.

¹⁵⁶² *Ibid.*, 5, 8.

¹⁵⁶³ C. Beaton-Wells, "Leniency policies in anti-cartel enforcement: critical review is well overdue", *Concurrences*, N°3 – 2015, 3 (in *Concurrences Competition Law Review English Edition* 2016).

¹⁵⁶⁴ G. Schnell & A. Dumas-Emard, "How to catch a thief – Corporate leniency and the irrepressible challenge of cartel detection; Finding a better way", *CPI Antitrust Chronicle*, September 2011, 3.

¹⁵⁶⁵ C. Beaton-Wells, "Leniency policies in anti-cartel enforcement: critical review is well overdue", *Concurrences*, N°3 – 2015, 4 (in *Concurrences Competition Law Review English Edition* 2016).

being revealed. The success of the leniency programme may not be overstated, as there still seems to be significant under-deterrence. Research is lacking on the timing of leniency applications, for instance. If leniency is most frequently employed strategically when a cartel is already dying, rather than when it is just beginning, this does not sufficiently deter firms from participating in cartels.¹⁵⁶⁶

An interesting argument is that the success of the leniency programme, at least in the US, may deliberately be exaggerated due to institutional reasons in the sense that there is political pressure to justify the DoJ's budget. Criticism toward the leniency programme would imply that the DoJ is less worthy of political and financial support. Minimising criticism would then improve the standing of the agency in negotiations for funding. This would allegedly explain the reluctance of the DoJ to re-examine its leniency programme and its unreceptive attitude towards any criticism of the programme. Additionally, agency prestige may be enhanced by mainly pursuing 'easy' cartel cases rather than more resource-intensive cases, in order to 'amp up the numbers'. In some settings the leniency program may lead to under-detection and contribute to this problem by causing too few prosecutions outside of those cartels uncovered via leniency.¹⁵⁶⁷

The idea underpinning leniency programmes is not based on solid moral grounds: while cartels are commonly viewed as one of the most egregious forms of competitive misconduct, the system basically rewards these very wrongdoers that should be punished. The reasoning thereby seems to be that the end justifies the means. The program is reactive rather than proactive, and over-reliance might divert regulatory attention away from more proactive enforcement techniques, such as for instance more rigorous industry monitoring, more active review of relevant press, or more actively solicit help of those not involved in the wrongdoing.¹⁵⁶⁸ According to SCHNELL and DUMAS-EMARD one should wonder whether 'the almost obsessive focus' on leniency programs took away potential focus on other enforcement mechanisms. Another issue is that it causes coordination issues with other elements of the enforcement system on a whole, such as private enforcement activity.¹⁵⁶⁹ MARSDEN rightly pointed to the fact that leniency is a concession for lawbreakers. Focus should remain on improving enforcement rather than making the process easier for them.¹⁵⁷⁰ The decision-making process of prospective leniency applicants, both at corporate and individual levels is a complex matter, that is necessarily simplified in the design of a leniency policy. Many of the variables may be unknown or unquantifiable. The rise in private damages actions has made this balancing act even more complex. If leniency information is excessively protected to the detriment of private damages claimants, this is problematic as it impedes the rights and potential recovery of an injured party in a private proceeding.¹⁵⁷¹

¹⁵⁶⁶ D. Daniel Sokol, "Cartels, corporate compliance, and what practitioners really think about enforcement", *Antitrust Law Journal*, Vol. 78, No. 1, 2012, 203-205, 207, 212-2014, 237.

¹⁵⁶⁷ Ibid., 203-205, 207, 213-214.

¹⁵⁶⁸ G. Schnell & A. Dumas-Emard, "How to catch a thief – Corporate leniency and the irrepressible challenge of cartel detection; Finding a better way", *CPI Antitrust Chronicle*, September 2011, 4-6. Also see C. Beaton-Wells, "Leniency policies in anti-cartel enforcement: critical review is well overdue", *Concurrences*, N°3 – 2015, 5 (in *Concurrences Competition Law Review English Edition* 2016).

¹⁵⁶⁹ G. Schnell & A. Dumas-Emard, "How to catch a thief – Corporate leniency and the irrepressible challenge of cartel detection; Finding a better way", *CPI Antitrust Chronicle*, September 2011, 4-5, 7.

¹⁵⁷⁰ Intervention by P. Marsden during ECON Committee and European Commission Public Hearing on empowering the national competition authorities to be more effective enforcers of the EU competition rules, European Parliament, Brussels, 19 April 2016.

¹⁵⁷¹ C. Beaton-Wells, "Leniency policies in anti-cartel enforcement: critical review is well overdue", *Concurrences*, N°3 – 2015, 5 (in *Concurrences Competition Law Review English Edition* 2016).

The success of leniency policies might eventually cause their demise. The proliferation of leniency policies across the globe renders it virtually impossible that an applicant will be successful in all relevant jurisdictions.¹⁵⁷² It was remarked during the Thirty-Seventh Annual Fordham Competition Law Institute Conference on International Antitrust Law & Policy that “*in recent cases, where there was a leniency applicant in the major jurisdictions, another company, which was not the first, applied for leniency in a number of other, often unusual jurisdictions, and the authorities in these jurisdictions started cases as well. At the end of the day the system might collapse: no company can then afford to go for leniency anymore, because it will spend millions of dollars defending itself against allegations in other jurisdictions where it is not the first.*”¹⁵⁷³ In 2016 intensifying discussions in Brussels and beyond took place about a perceived decline in immunity applications.¹⁵⁷⁴

There seems to be some discord between the EU Courts and the EU legislator. The courts repeatedly stated that protection of leniency information should not stand in the way of private damages recovery and that the interest of a company not to pay damages is not worthy of protection. The European Parliament, however, “*calls on the Commission to ensure the attractiveness of leniency programmes and settlement procedures, taking into account the general principle governing the exchange of confidential information [...]; stresses, therefore, the importance of protecting documents relating to leniency applications or settlement procedures, in particular from potential future disclosure in the context of civil or criminal proceedings, in order to provide leniency applicants and parties to a settlement procedure with a guarantee that those documents will not be transmitted or used without their prior consent [...]*.”¹⁵⁷⁵ The EU legislator therefore appears to grant a rather generous amount of protection to leniency documents.

All the above indicates that it is ill-advised to centre or form other enforcement mechanisms around the leniency policy, as seems to be happening with international cooperation whereby the exchange of leniency information is prohibited. Cooperation may even strengthen an authority’s ability to start *ex officio* cartel cases, and thereby prevent competition authorities from becoming overly dependent on their leniency programmes.¹⁵⁷⁶ The current relationship between public and private enforcement in the EU competition law landscape is far from ideal, and has lead JONES to rightly state that a public enforcement system that draws from limitations on the damages that private plaintiffs can obtain, violating their EU rights, is fundamentally flawed.¹⁵⁷⁷ In other countries such as Brazil, the level of confidentiality protection granted to leniency documents was diminished rather than enhanced.¹⁵⁷⁸ The negotiators of the EU-Switzerland Agreement understandably accommodated

¹⁵⁷² Ibid..

¹⁵⁷³ Hawk, Barry, 2010 *International Antitrust Law & Policy: Fordham Competition Law*, Fordham University School of Law, New York, Juris Publishing, 2011, 93. By DE PREE (De Brauw Blackstone Westbroek, Amsterdam).

¹⁵⁷⁴ “The European antitrust leniency calculus c.2016: still worth it?”, Brussels Matters Panel Discussion, Brussels, 16 June 2016. The aim of the panel was to discuss current benefits and drawbacks of applying for leniency to DG COMP under the 2006 Notice as well as the ECN’s 2012 Model Leniency Programme.

¹⁵⁷⁵ European Parliament Resolution on EU Cooperation Agreements on Competition Policy Enforcement – The Way Forward, 2013/2921(RSP), 5 February 2014.

¹⁵⁷⁶ P. Amador Sanchez, G. Bakker, A. Kleijweg, “The art of enforcement: Cooperation with other institutions, a national competition authority’s perspective” in H. Don, J. de Keijzer, E. Lamboo, M. van Oers, J. van Sinderen (eds), *The Art of Supervision, Liber Amicorum, Pieter Kalbfleisch*, Rotterdam, Editor Ronald Kouwenhoven, 2011, 41-42.

¹⁵⁷⁷ C. Jones, “The quality of mercy and the quality of justice: reflections on the discovery of leniency documents and private actions for damages in the European Union” in N. Charbit, E. Ramundo, A. Chetova & A. Slater (eds) *William E. Kovacic, An antitrust tribute, Liber Amicorum – Volume I*, New York, Institute of Competition Law, 2012, 261.

¹⁵⁷⁸ E. Molan Gaban, N. de Vicente Santos & F. Duarte Calmon Carvalho, “Brazil: STJ Restricts the Confidentiality Extension Granted to Leniency Agreement Provisions Entered into by CADE”, *Tauil & Chequer Legal Update*, 16 May 2016; A. Ribeiro, M. Dias Soares, R. Carrilho Donas, “The Brazilian Superior Court of Justice limits the confidentiality of the Competition Authority’s leniency agreements (Electrolux)”, *e-Competition Bulletin*, May 2016-II, Art. N° 79729, 8 March 2016.

concerns of competition authorities that the leniency policy might be undermined if leniency-related information could be freely exchanged, but they have taken this concession a step too far by banning the exchange entirely. The fact that only the corporate statement is protected is not sufficiently clear from the text of the Agreement. Some authors suggest that voluntarily submitted information should receive the least protection from disclosure as the consequences of cooperation can be assessed in advance, in contrast to information that was taken via compulsory process.¹⁵⁷⁹

A balanced solution could be a more detailed categorization of documents deserving full or partial protection. Now the scope of leniency documents that is protected is not transparent or unspecified. Rather than de facto banning all information exchange or discussion of leniency documents, it would be a valid alternative to consider categorisation of relevant documents and accord different levels of protection. CHOWDHURY for instance suggested that if the rationale is a legitimate fear that leniency applicants will not self-report if doing so might increase their exposure elsewhere, an alternative to an outright restriction on agency powers to share confidential information could be that only information submitted by the leniency applicant that pertains to the involvement of other co-conspirators could be exchanged without approval. This would ensure that the primary leniency applicant is protected and therefore not discouraged to self-report.¹⁵⁸⁰

3.5.3 Third concern: due process

Discussions on procedural fairness, or due process, as well as on agency transparency more generally, have taken a central role in the competition law enforcement debate over the last years, and rightly so. Procedural fairness is crucial to increase trust in the international cooperation process.¹⁵⁸¹

This focus on due process has also spread to the international level. Concerns have arisen for example as a consequence of differences in the scope and application of legal privileges, such as the legal professional privilege/attorney-client privilege or the privilege against self-incrimination.¹⁵⁸² For instance, the professional legal privilege may apply only to external lawyers (as in the EU) or also to in-house counsel (as in Switzerland to a certain extent, Canada and the US), or the duration of the protection may differ. These are issues that cause concern in the business community. BIAC, for instance, uses strong language by stating that “[i]t will remain impossible to achieve the highest possible level of co-operation in respect of international leniency cases, or indeed international cartel cases more generally, without recognition by all authorities concerned that businesses need to be able to seek advice in confidence from lawyers around the world to examine their conduct in the light of all applicable competition laws and to prepare an appropriate strategy for resolving any problems which may have arisen”¹⁵⁸³ Another example is that in the US and Canada, only

¹⁵⁷⁹ See S. Peyer, “Access to competition authorities’ files in private antitrust litigation”, *Journal of Antitrust Enforcement*, Vol. 3, No. 1, 2015, 66; C. Jones, “The quality of mercy and the quality of justice: reflections on the discovery of leniency documents and private actions for damages in the European Union” in N. Charbit, E. Ramundo, A. Chetova & A. Slater (eds), *William E. Kovacic, An antitrust tribute, Liber Amicorum – Volume I*, New York, Institute of Competition Law, 2012, 249.

¹⁵⁸⁰ M. Chowdhury, “From paper promises to concrete commitments: Dismantling the obstacles to transatlantic cooperation in cartel enforcement”, AAI Working Paper No. 11-09, November 28, 2011, 15.

¹⁵⁸¹ R.E. Hoffinger, “Ending the ‘confidentiality exception’ to due process”, *CPI Antitrust Chronicle*, November 2013, 2.

¹⁵⁸² OECD Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 44. Privileges can be defined as “rights given to persons, whether individual or legal, in certain circumstances, to refuse to produce any documentary material, or give any oral or written testimonies in judicial proceedings.” B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 142.

¹⁵⁸³ OECD, Global forum on Competition, Improving international co-operation in cartel investigations, Contribution from BIAC, DAF/COMP/GF/WD(2012)57, 13 February 2012, 5.

individuals enjoy the right not to incriminate oneself, not companies. In the EU the right of companies not to admit an infringement is only recognised to a certain extent. Companies are under the obligation to cooperate with investigations. This includes providing evidence which can be used to prove an infringement (see above, Part II, 3.4.3.2, A).¹⁵⁸⁴ The difference between countries where competition law infringements are mainly administratively punished and those where criminal sanctions apply, is relevant as well. Evidence obtained in the context of a civil investigation should not be used as the basis of criminal prosecutions as the same level of protection does not apply and higher procedural guarantees are applicable in the latter.¹⁵⁸⁵

3.5.3.1 What level of protection?

Under the EU-Switzerland Agreement information obtained through investigative process cannot be discussed, requested or transmitted, if the use of this information would be prohibited under the procedural rights and privileges guaranteed under the respective laws of the parties.¹⁵⁸⁶ The OECD Competition Committee Best Practices suggested that the higher level of protection valid in both countries is used. Also the Hague Evidence Convention favours this approach.¹⁵⁸⁷ This method guarantees the fullest respect of the procedural rights.¹⁵⁸⁸ Also in the 2014 OECD Recommendations concerning international cooperation on competition investigations and proceedings it is advised that “[t]he transmitting Adherent should apply its own rules governing applicable privileges, including the privilege against self-incrimination and professional privileges, when transmitting the requested confidential information, and endeavour not to provide information deemed privileged in the receiving Adherent.”¹⁵⁸⁹ It could be understood that the EU-Switzerland Agreement indeed adheres to what is stated in the Hague Convention and that the highest level of protection will apply in case information is protected by legal professional privilege in one jurisdiction but not in another.¹⁵⁹⁰ However, according to DUCREY, the Hague Convention was not followed and it is the level of protection offered by the jurisdiction of the authority that wishes to ‘use’ the information that applies. The issue allegedly was not a point of discussion.¹⁵⁹¹ Whether information subject to Swiss blocking statutes, such as banking secrecy rules,¹⁵⁹² falls under this exception will depend on the exact meaning of the word ‘privileges’ in the Agreement. If it does not

¹⁵⁸⁴ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 27.

¹⁵⁸⁵ M. Chowdhury, “From Paper Promises to Concrete Commitments: Dismantling the Obstacles to Transatlantic Cooperation in Cartel Enforcement”, American Antitrust Institute Working Paper No. 11-09, 28 November 2011, 19.

¹⁵⁸⁶ Article 7(7) EU-Switzerland Agreement.

¹⁵⁸⁷ Its Article 11 states that “in the execution of a letter of request the person concerned may refuse to give evidence in so far as he has the privilege or duty to refuse to give the evidence (a) under the law of the State of execution; or (b) under the law of the State of origin.” Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, The Hague, 18 March 1970.

¹⁵⁸⁸ B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 143-44.

¹⁵⁸⁹ OECD, Recommendation of the OECD Council Concerning International Co-operation on Competition Investigations and Proceedings, C(2014)108, 16 September 2014.

¹⁵⁹⁰ Interview with Commission official. Also see Message relatif à l’approbation de l’accord entre la Suisse et l’Union européenne concernant la coopération en matière d’application de leurs droits de la concurrence, 13.044, 22 mai 2013, <https://www.admin.ch/opc/fr/federal-gazette/2013/3477.pdf>: “Le par. 7 concrétise le principe de «double barrière». En effet, selon ce principe reconnu en droit des cartels, une autorité ne peut transmettre que les informations qu’elle pourrait elle-même utiliser dans ses procédures. Elle doit également appliquer les droits et protections prévus par son ordre juridique lorsqu’elle utilise les informations reçues de la part de l’autre autorité.”

¹⁵⁹¹ Telephone interview with Patrik Ducrey, member of the Swiss negotiating team for the EU-Switzerland second generation Agreement, 24 February 2017.

¹⁵⁹² It should be noted that the EU and Switzerland have signed an agreement that puts an end to Swiss banking secrecy for EU residents. Council of the European Union, Amending Protocol to the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments, 8297/15, 21 May 2015.

fall within that scope, “any ‘Swiss Finish’ [...] will get lost upon transmission of information to the European Commission since the confidentiality of transmitted information will be governed by the law of the receiving authority.”¹⁵⁹³ It is regrettable that this provision was not stated in more clear terms, by for instance taking over the exact formulation of the Hague Conference and exclude any ambiguity.

In the US-Australia Agreement it is unclear as well whether the higher level of protection is applied. Article II (I) of the US-Australia Agreement states that nothing in the Agreement obliges a person to provide antitrust evidence if this would run against any legally applicable right or privilege. The meaning of ‘any legally applicable’ may be subject to debate. In case a request for information should result in the transmission of information that was privileged in the receiving jurisdiction, while it was not in the sending jurisdiction, this may constitute grounds for a court in the receiving jurisdiction to reject or overturn the case entirely on procedural grounds. The use of ‘taint teams’ to filter the information and avert this risk is very human-resource intensive.¹⁵⁹⁴

3.5.3.2 Personal data use

The Agreement also lacks clarity with regard to the level of protection of personal data. The concept of ‘personal data’ is not defined for the purposes of the Agreement. Generally it entails ‘information relating to identified or identifiable natural persons’, such as names, contact details, or the position of the natural person in an undertaking or in an administration.¹⁵⁹⁵ The protection of personal data is determined by the law of the receiving authority. It is unclear how the partner authorities will deal with the fact that Swiss data protection laws offer more extensive protection than some data protection laws in the EU and its Member States, as that law applies both to companies and natural persons. It might indicate that the data that are transmitted to the European Commission may not be granted protection of equal scope as Swiss data protection law.¹⁵⁹⁶ The content of this provision may moreover fluctuate alongside changes in domestic personal data laws. As a case in point, the EU in 2016 reformed the old 1995 data protection rules.¹⁵⁹⁷

3.5.3.3 Notice and intermediary appeal

One particular point of discussion is the issue of notice and appeal against a transmission decision. Even within BIAC there is no consensus on these issues.¹⁵⁹⁸ Many agencies do not give notice, either

¹⁵⁹³ F. Hoffet, M. Dietrich, G. Brei, “Cooperation Agreement Switzerland – EU on Competition Law becomes effective on 1 December 2014, Facilitation of the Transmission of Confidential Information and Documents between Swiss and European Competition Authorities”, *Homburger Bulletin*, 6 November 2014, available at http://www.homburger.ch/fileadmin/publications/Homburger_Bulletin_20141106_EN.PDF (accessed August 2016), 3.

¹⁵⁹⁴ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 24.

¹⁵⁹⁵ “[...] an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity.” OECD, Discussion on how to define confidential information, Contribution of the European Union, DAF/COMP/WP3/WD(2013)57, 29 October 2013, 2-3.

¹⁵⁹⁶ D. Mamane, “Competition law cooperation agreement EU/Switzerland”, *Kluwer Competition Law Blog*, 31 July 2012.

¹⁵⁹⁷ European Commission, “Reform of EU data protection rules”, available at http://ec.europa.eu/justice/data-protection/reform/index_en.htm and <http://ec.europa.eu/justice/data-protection/> (accessed November 2016).

¹⁵⁹⁸ OECD, BIAC Working Group on Information Exchange in International Cartel Investigations Update, Presented to the OECD Competition Committee Working Party 3 on International Co-operation by Goldman, Calvin S. and Rill, James F., Vice Chairs, BIAC Competition Committee, 14 October 2003, 3-6. The same principle was suggested by

before or after the fact, of interagency disclosure of confidential information. The lack of notification implies that parties are unable to verify in a timely manner whether the exchanged evidence was gathered in a legal manner by the transmitting authority or whether the qualification of certain information as confidential happened correctly. For instance, parties cannot assess in a timely manner whether Article VII (7) of the EU-Switzerland Agreement was complied with, prohibiting the discussion or transmission of information if using such information would be forbidden under the procedural rights and privileges guaranteed under the respective laws of the Parties.¹⁵⁹⁹ They cannot object or request certain safeguards before a transfer.

In the EU-Switzerland Agreement the parties under scrutiny are not notified when information is transmitted without their consent, and the Agreement does not offer undertakings a right to intermediary appeal or even prior consultation.¹⁶⁰⁰ Undertakings will only be informed of information exchanges when required by national data-protection laws.¹⁶⁰¹ The Swiss Cartel Act, that was revised to accommodate the EU-Switzerland Agreement, however, provides in Article 42b dealing with ‘disclosure of data to foreign competition authorities’ that “[t]he competition authorities shall notify the undertaking concerned and invite it to state its views before transmitting the data to the foreign competition authority.”¹⁶⁰² Undertakings should therefore be informed and be able to take position before any information is transmitted. The provision is silent, however, on the possibility of challenging such transmission. There is ambiguity with regard to whether or not the Agreement affects domestic remedies such as those provided for by Swiss law.¹⁶⁰³ According to DUCREY, if an appeal is nevertheless filed, it is unclear whether appeal courts in Switzerland and the EU will follow the Agreement and will not provide for any legal protection with regard to the transmission of confidential information or evidence.¹⁶⁰⁴ While the US-Australia Agreement is silent with regard to notice prior to or after transmission to the other enforcement authority, “U.S. antitrust enforcers have stated they are willing to provide notice after the fact in appropriate circumstances.”¹⁶⁰⁵ Notice will be given for

ICPAC (International Competition Policy Advisory Committee to the US Attorney General): notice should be provided only where there is no longer any risk of jeopardy to an investigation.

¹⁵⁹⁹ P. Kobel & D. Viros, “Cooperation Agreement – Investigations – Confidentiality obligations: The European Union and Switzerland reach the agreement concerning the application of their competition law entering in force on 1st December 2014”, *Concurrences*, N° 2- 2015, 214.

¹⁶⁰⁰ S. Hammond, D. Wood, M. Healy, “New Swiss/EU Cooperation Agreement creates enhanced enforcement opportunities for antitrust regulators, but leaves uncertainty for companies”, *Gibson Dunn Publications*, 10 December 2014, available at <http://www.gibsondunn.com/publications/Documents/New-Swiss-EU-Cooperation-Agreement-Creates-Enhanced-Enforcement-Opportunities-for-Antitrust-Regulators.pdf> (accessed August 2016).

¹⁶⁰¹ Message relatif à l’approbation de l’accord entre la Suisse et l’Union européenne concernant la coopération en matière d’application de leurs droits de la concurrence, 13.044, 22 mai 2013, <https://www.admin.ch/opc/fr/federal-gazette/2013/3477.pdf>.

¹⁶⁰² Federal Act on Cartels and other Restraints of Competition of 6 October 1995. (CartA)

¹⁶⁰³ Such as Article 25a Swiss Administrative Procedure Act for instance, which allows an undertaking with an interest that is worthy of protection to request the responsible authority to refrain from the contested act. It is unclear whether this indirect possibility to appeal is excluded by the Agreement. Statements in the document accompanying the bill (Botschaft) and in Article 42b CartA cause confusion. According to HOFFET, DIETRICH and BREI an explicit legal provision stipulating the exclusion is required. F. Hoffet, M. Dietrich, G. Brei, “Cooperation Agreement Switzerland – EU on Competition Law becomes effective on 1 December 2014, Facilitation of the Transmission of Confidential Information and Documents between Swiss and European Competition Authorities”, *Homburger Bulletin*, 6 November 2014, available at http://www.homburger.ch/fileadmin/publications/Homburger_Bulletin_20141106_EN.PDF (accessed August 2016), 4.

¹⁶⁰⁴ P. Ducrey, “The Agreement between Switzerland and the EU concerning cooperation in the Application of their competition laws”, *Journal of European Competition Law & Practice*, Vol. 4, No. 5, 2013, 442.

¹⁶⁰⁵ International Competition Policy Advisory Committee Antitrust Division, ICPAC Final Report, 2000, available at <http://www.library.unt.edu/gpo/ICPAC/finalreport.htm> (accessed September 2015), Chapter 4; Antitrust Civil

instance when a US antitrust authority seeks information from a US firm that will be used when responding to a request for assistance from a sister antitrust authority, or, when requested by the producing party, in situations where information is voluntarily provided. The US' International Competition Policy Advisory Committee recommended in its report that the US antitrust authorities consider providing a priori or ex post notice of an intent to disclose information to foreign antitrust authorities, unless doing so would violate a treaty obligation, a court order, or jeopardize the integrity of a domestic or foreign investigation.¹⁶⁰⁶

The ICN Agency Effectiveness Project on Investigative Process confirmed that most competition agencies that may disclose information without the submitting party's consent do not offer the submitter an opportunity to object to the authority's decision to disclose information. A common justification is the threat such notice and review may pose to the investigation.¹⁶⁰⁷ This takes priority as allegedly the rights and obligations of the undertakings are not determined by a transmission decision and a transmission decision does not bring a distinct change in the legal position of the undertakings concerned.¹⁶⁰⁸ This statement could be challenged, however, as an illegal transmission of information may very well affect a company's rights of defence, if the damage would be long done by the time appeal of the final decision is possible. While the risk of abuse is indeed real, this could be mitigated by only allowing intermediary appeal subject to a strict prima facie test whether the action is not unfounded or strategic, and merely intended to stall the process. The European Parliament in its Resolution on 'EU cooperation agreements on competition policy enforcement – the way forward' noted that allowing intermediary appeals, for instance against a decision to exchange information, could potentially block investigations and compromise the effectiveness of the agreement, but simultaneously called for a coherent approach to appeals against final decisions in both jurisdictions.¹⁶⁰⁹

ALBERS rightly expressed his disappointment concerning the fact that the jurisdictions creating legal platforms for more extensive information exchanges have remained vague with regard to how the rights of defendants and information providers will be safeguarded. Different timetables, investigative powers, and legal guarantees revolving around compulsory collection and treatment of information create uncertainty and distrust from companies towards the international cooperation process.¹⁶¹⁰ International cooperation agreements therefore can and should contribute to the creation of a more trusting environment, by providing clear and full information on due process.

Procedure Act §3, 15 USC § 1312 (providing a right to object to a Civil Investigative Demand (CID) that orders production of information that came into the CID-recipient's possession through discovery from another person in order to prevent or condition production of otherwise protected or privileged information).

¹⁶⁰⁶ See G. Spratling, "Negotiating the waters of international cartel prosecutions – Antitrust Division Policies Relating to Plea Agreements in International Cases", Speech before the ABA Criminal Justice Section's Thirteenth Annual National Institute on White Collar Crime, 4 March, 1999, 12-13 for the Antitrust Division's policy in criminal matters.

¹⁶⁰⁷ ICN, Agency Effectiveness Project on Investigative Process – Competition Agency Confidentiality Practices, April 2014, 36.

¹⁶⁰⁸ P. Kobel & D. Viros, "Cooperation Agreement – Investigations – Confidentiality obligations: The European Union and Switzerland reach the agreement concerning the application of their competition law entering in force on 1st December 2014", *Concurrences*, N° 2- 2015, 214.

¹⁶⁰⁹ European Parliament Resolution on EU Cooperation Agreements on Competition Policy Enforcement – The Way Forward, 2013/2921(RSP), 5 February 2014, paragraph 5.

¹⁶¹⁰ M. Albers, "National Competition Laws, International Cooperation and Procedural Rights" paper for Cauffman, Caroline, Hao, Qian (eds), *Procedural Rights in Competition Law in the EU and China*, China-EU Law Series, Vol 3., Berlin, Heidelberg, Springer, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567001 (accessed July 2017), 15.

3.5.4 Fourth concern: preserving national sovereignty

Another concern, this time coming from rulemakers and enforcers, revolves around the will to preserve national sovereignty. On the one hand, there exists a fear of losing control over the enforcement agenda and the allocation of the, often scarce, resources due to an imbalance in the number of requests from one competition authority to another.¹⁶¹¹ This challenge might not be as big as it appears, however, as existing second generation agreements generally limit cooperation to cases where agencies are working on the same or related cases.

There is some reluctance to let national interests be harmed through cooperation.¹⁶¹² The problem is double. On the one hand it relates to the design of national competition laws, that are intended to deal with practices harming domestic markets rather than foreign markets. On the other hand, the application of such laws may be biased towards the national interests.¹⁶¹³ It is believed that when confidential information is shared, this will lead to the prosecution and sanctioning of domestic companies in a foreign jurisdiction, potentially negatively affecting national welfare, regardless of the fact whether any harm has been caused on the domestic market.¹⁶¹⁴ FOX refers to this phenomenon as ‘the problem of myopic or bounded concern, or disregard’ and ‘the problem of parochialism’, which boils down to the adage ‘happy to hurt you and aggrandise me’.¹⁶¹⁵ Consumer interest is still interpreted as meaning the interest of domestic consumers.¹⁶¹⁶ More broadly than national consumer interest, the interests of certain ‘national champions’ also play a role.¹⁶¹⁷ Jurisdictions have a tendency to enforce competition laws mainly with the domestic interests in mind, disregarding potential effects on foreign markets.¹⁶¹⁸ Local welfare considerations continue to play a role in competition rulings, to the detriment of the collective global welfare.¹⁶¹⁹

CHOWDHURY believed that this desire to protect and preserve national sovereignty is one of the most important explanations for the lack of progress in establishing an international antitrust regime and for the non-compulsory nature of the already limited information-sharing provisions in first and second generation agreements. These concerns are more present with regard to second generation

¹⁶¹¹ M. Chowdhury, “From Paper Promises to Concrete Commitments: Dismantling the Obstacles to Transatlantic Cooperation in Cartel Enforcement”, American Antitrust Institute Working Paper No. 11-09, 28 November 2011, 13.

¹⁶¹² Ibid.

¹⁶¹³ M. Taylor, *International Competition Law: a New Dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 121.

¹⁶¹⁴ M. Martyniszyn, “Discovery and Evidence in Transnational Antitrust Cases: Current Framework and the Way Forward”, Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law; University College Dublin - School of Law, 2012, 33, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2142978 (accessed August 2016), 33.

¹⁶¹⁵ E. Fox, “Antitrust without borders: from roots to codes to networks”, E15 Expert Group on Competition Policy and the Trade System Think Piece, November 2015, 6.

¹⁶¹⁶ M. Chowdhury, “From Paper Promises to Concrete Commitments: Dismantling the Obstacles to Transatlantic Cooperation in Cartel Enforcement”, American Antitrust Institute Working Paper No. 11-09, 28 November 2011, 19-20.

¹⁶¹⁷ In this context a ‘national champion’ is meant to be an undertaking that is “*subject to a particular treatment from governments because of some national dimension in their operation.*” D. Neven, Chief Economist DG COMP, European Commission, “Ownership, performance and national champions”, available at <http://ec.europa.eu/dgs/competition/economist/opnc.pdf> (accessed August 2016), 1.

¹⁶¹⁸ C. Leskinen, “The EU/US cooperation in the field of antitrust law enforcement – some challenges for future cooperation”, Working Paper IE Law School, 5 May 2010, 3.

¹⁶¹⁹ B. Sweeney, “International Competition Law and Policy: A Work in Progress”, *Melbourne Journal of International Law*, Vol. 10, 2009, 58-59; C. Leskinen, “The EU/US cooperation in the field of antitrust law enforcement – some challenges for future cooperation”, Working Paper IE Law School, 5 May 2010, 3.

agreements, as these allow for more elaborate forms of cooperation. The concern, somewhat understandable considering the interconnectedness of competition policy with industrial and trade policy, is nevertheless testimony of the reality that national interests still dominate the international scene, rather than an interest in a global level playing field. Advocacy therefore remains important to make sure all heads face the same direction, and to increase confidence in the cooperation process and the procedures of peers.

It remains problematic that national authorities often lack the political clout to convince politicians that the sharing of information with a foreign peer is in the country's best interest, in particular if no short-term benefits are involved.¹⁶²⁰ As such, there is a paradox in keeping competition cooperation between competition authorities neutral and shielded from political influences, while at the same time depending on these politicians for further cooperation. Governments must listen to the concerns of their constituencies, while competition authorities should enforce the law regardless of national interest. It is crucial therefore that competition agencies can function in complete independence from political influence, be it directly or via budgetary means, but that at the same time a dialogue is established between the legislature and the executive.

3.6 Assessment based on benchmarks

As second generation agreements to a large extent reiterate the provisions in first generation agreements, the assessment valid for that kind of agreement is relevant here as well (see above, Part II, 2.5.2). In this section the benchmarks will be applied to the information exchange system contained in second generation agreements in particular.

3.6.1 Limiting negative externalities: conflict avoidance

More extensive information exchange broadens the path to consistent remedies and therefore conflict avoidance. The more freely agencies can share information, the more they can coordinate their investigations and remedies. Second generation agreements definitely bring added value with regard to the scope of information exchange as compared to the situation without an agreement. As mentioned, however, even when confidential information may be exchanged, conflicting remedies can never be entirely excluded, due to for instance different substantive rules, the fact that competition policy is intertwined with other policies and cultures, or simply a different factual context. Nevertheless, the agreement could have allowed for more extensive information exchange and cooperation mechanisms, such as active investigatory assistance.

3.6.2 Rationalisation of resources

As the EU-Switzerland Agreement does not allow active information gathering on behalf of the partner authority, but limits the exchange of information to that which is already on file with the authority, the costs of information exchange can remain limited and rationalisation of resources can occur due to a potential increase in the efficiency and effectiveness of the investigation. According to FONTEIJN and KEEFFE, “[t]he administrative savings to be gained by using information already lawfully gathered

¹⁶²⁰ F. Jenny, “International cooperation on competition: myth, reality and perspective”, University of Minnesota law school conference on global antitrust law and policy, Minneapolis, 20-21 September 2002, 4.

by another government agency are considerable."¹⁶²¹ The cost of a formal agreement is justified here, in contrast to first generation agreements, because the agreement forms the legal basis allowing the exchange of confidential information.

On a more abstract level, the full cost of advanced information exchange will yet have to become clear. The suspicion with which second generation agreements are beheld will have to be overcome by successful practice. In particular the effects on the public-private enforcement balance are difficult to foresee.

3.6.3 Increased effectiveness and efficiency of investigations

The fact that confidential information can be exchanged will certainly increase the efficiency and effectiveness of competition proceedings in both jurisdictions. As limits on the exchange of such information were identified as important impediments to international cooperation (see above, Part II, 3.1), their removal will certainly generate benefits.

Some remarks must however be made. Efficiency gains might not reach their full potential as first of all information exchange is heavily conditioned. One aspect that does not seem to occur in other agreements of the kind is that information obtained by investigative process may only be transmitted where both competition authorities are investigating the same or related cases. Moreover, while not an insignificant step forward, only information exchange is developed in the EU-Switzerland Agreement, while other mechanisms stay behind. The lack of active assistance limits additional efficiency increases.

3.6.4 Increased transparency and legal certainty

The Agreement lacks overall transparency and clarity. Examples include the uncertainty revolving around the exchange of information originating from a failed settlement attempt, or the scope of data protection considering the fact that EU and Swiss data protection rules differ. As is the case in the US-Australia Agreement, the EU-Switzerland Agreement would benefit from an annex listing the relevant laws and procedures of both parties regarding confidentiality and data protection. Even though the EU's law is largely defined by case-law, it would certainly provide a relevant starting point for parties to gain additional insight in the possibilities and risks offered by the Agreement. It is then equally important that a cooperation agreement requires the parties to notify each other as soon as possible when legislation or policy is subject to relevant change, currently present in Article 11 (2) of the Agreement. As stated by the OECD, thorough understanding of the respective substantial and procedural rules is imperative for different jurisdictions to cooperate effectively and efficiently.¹⁶²² One particular aspect in this regard is what constitutes non-public yet non-confidential agency information. A cooperation agreement should create complete clarity on what information agencies can exchange.

Another matter that deserves additional transparency is the issue of how the rights of defendants and providers of information are to be guaranteed when information is exchanged, for instance whether

¹⁶²¹ Chris Fonteijn and Siún O'Keeffe, "Information Exchange Between Authorities: Enhancing Enforcement", 21st St.Gallen International Competition Law Forum ICF, May 15th and 16th 2014, 10.

¹⁶²² OECD, Report/Inventory on provisions contained in existing international co-operation agreements, Note by the Secretariat, DAF/COMP/WP3(2014)10, 16 December 2014, 22.

incriminatory information was gathered in a legal manner.¹⁶²³ The EU has missed an opportunity to take the lead in taking international competition cooperation to the next level and to confirm its role as major player in the international competition scene. The EU-Switzerland Agreement appears to overly anticipate certain concerns, such as the protection of the leniency programme, while simultaneously failing to address other, more crucial, issues, such as due process. There is an apparent discord between the issues deserving to be addressed and the issues actually addressed in the Agreement.

3.6.5 Practical issues

As made clear throughout the above analysis, more practical guidance is needed with regard to bilateral cooperation. More concrete examples of cooperation should either be included in the agreement or in an annex. While presenting more than ‘practical’ problems, more explicit definitions would render cooperation much more practical. Bilateral agreements can flesh out multilateral recommendations. The countries engaging in such agreements are generally experienced competition law enforcers and need to assume their leading role.

3.6.6 Decreased burden for companies

The EU-Switzerland Agreement does not actively contribute to alleviating the procedural burden for companies, as the main goal is enhanced enforcement. However, as the Agreement applies to mergers, full and transparent information exchange does benefit the companies involved, although they will likely still provide a waiver. The Agreement could have gone further, however, by for instance also including a formal streamlining of the leniency process or the waiver system, considering the advanced similarity between both competition law systems.¹⁶²⁴ This would increase public support for this type of agreements.

3.6.7 Discipline

Finally, the Agreement falls short when it comes to installing discipline in the cooperation process. The parties are left a large margin of discretion in deciding whether and to what extent to cooperate, despite several rather strict safeguards. Such caution may be understandable, however, as it is the first agreement of this kind for the EU. It would, however, be desirable to develop stronger language throughout the Agreement, as suggested above, expressing a firm commitment to international cooperation. As competition law affects a wide range of business activities, the credibility of hard commitments may at times be preferred to offer firms doing business internationally the clarity and consistency the competitive process deserves.¹⁶²⁵ The fact that a cooperation agreement has been

¹⁶²³ M. Albers, “National Competition Laws, International Cooperation and Procedural Rights” paper for Cauffman, Caroline, Hao, Qian (eds), *Procedural Rights in Competition Law in the EU and China*, China-EU Law Series, Vol 3., Berlin, Heidelberg, Springer, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567001 (accessed July 2017), 14.

¹⁶²⁴ For an overview of the remaining differences, see http://uk.practicallaw.com/0-501-3634?qaq=W_q1&qaq=W_q2&qaq=W_q3&qaq=W_q4&qaq=W_q5&qaq=W_q6&qaq=W_q7&qaq=W_q8&qaq=W_q9&qaq=W_q10&qaq=W_q11&qaq=W_q12&qaq=W_q13&qaq=W_q14&qaq=W_q15&qaq=W_q16&qaq=W_q17&qaq=W_q18&qaid=0-517-4976&qaid=5-500-5740# (accessed December 2016, all relevant questions selected, EU and Switzerland selected as relevant jurisdictions). A full analysis of both leniency systems is beyond the scope of this study.

¹⁶²⁵ Also see J. Wayland, “International cooperation at the antitrust division”, remarks as prepared for the International Bar Association’s 16th Annual Competition Conference, Florence, 14 September 2012, 9.

concluded with a particular jurisdiction should have a positive influence on the decision whether or not to cooperate.

4. Alternatives and complements: workable or not?

Bilateral cooperation via first and second generation agreements as it exists now evidently is not the only way in which international cooperation in the field of competition law enforcement can take place. While multilateral cooperation and cooperation via non-competition specific agreements will be scrutinised in Part III, the current section analyses some alternatives and complementary measures. A distinction is made between alternative cooperation mechanisms used in the field of competition law and lessons that may be drawn from other policy fields.

4.1 Alternative cooperation mechanisms in the field of competition law

Some alternative cooperation mechanisms outside bilateral agreements can be found in the field of competition law itself. Some of the suggested mechanisms below, in particular the use of waivers, information gateways, and investigative assistance, were included in the most recent 2014 OECD Recommendations concerning International Co-operation on Competition Investigations and Proceedings.¹⁶²⁶

4.1.1 Waivers

The most well-known alternative to second generation agreements for competition authorities wishing to exchange confidential information are so-called waivers of confidentiality.

4.1.1.1 Definition and use

The OECD/ICN Joint Survey on international competition cooperation defined a ‘(confidentiality) waiver’ as *“any permission granted by a party under investigation or a third party in a case/investigation that enables investigating agencies in different jurisdictions to discuss and/or exchange information, which is protected by confidentiality rules of the jurisdiction(s) involved, and which has been obtained from the party in question.”*¹⁶²⁷ Considering the limited use of second generation agreements and the strongly voiced protest against confidential information exchange between competition authorities, one might wonder why a party subject to competition law scrutiny would grant a waiver. In general the benefits of granting a waiver are that it allows the waiving party to understand the information-sharing process, and provides it with a certain level of control over the type of information that the investigating agencies may exchange. It also demonstrates a general intention to collaborate in the investigation, and it allows the agencies to make fully-informed decisions. Waivers often permit quick, easy, and early information exchange, thereby facilitating coordination of the investigation from the beginning.¹⁶²⁸

In the experience of both the EU and the US authorities, more than the actual exchange of information, it is the removal of constraints which would otherwise prevent the agencies from

¹⁶²⁶ OECD, Recommendation of the OECD Council Concerning International Co-operation on Competition Investigations and Proceedings, C(2014)108, 16 September 2014.

¹⁶²⁷ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 97.

¹⁶²⁸ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 38.

having a free and unfettered dialogue and which in other circumstances may lead to misunderstandings that is the main benefit of a waiver.¹⁶²⁹ Waivers are mainly used to allow fully informed discussion by agencies in different jurisdictions of confidential information already in possession of the agencies. Most often cooperation therefore occurs orally.¹⁶³⁰ Waivers are used for several reasons, however, including the exchange of specific documents disclosing anticompetitive behaviour, the disclosure of a Commission decision when it has not yet been made public, or similarly the provision of advance copies of official notices setting out the Commission's analysis and the terms of the proposed settlement of a case, or the detailed discussion of all aspects of a pending case, including remedies.¹⁶³¹ It is confirmed by the ICN's explanatory note accompanying its waiver templates that while the latter do not preclude the exchange of documents between competition agencies, such exchanges only occur exceptionally.¹⁶³²

In 2012 a trend was identified among the more experienced competition authorities to require more (and more expansive) waivers, allowing both the exchange of information and of evidence.¹⁶³³ It was established that competition agencies increasingly relied on waivers to overcome statutory limitations preventing them from exchanging confidential information.¹⁶³⁴ This increased reliance is only a recent occurrence, at least in non-merger matters. In 2010 still, it was said that “[t]he experience of EU-US cooperation reveals that only in one case relating to abuse of a dominant position did a company offer a waiver of confidentiality, [...] In the same period, there was not even one (publicly known) waiver of confidentiality with respect to a cartel case.”¹⁶³⁵ Waivers are indeed most frequently used in merger cases. A Commission official in 2014 stated that 70% of international mergers cases involve waivers.¹⁶³⁶ The survey spread in the framework of this study revealed varied answers with regard to the use of waivers. Some firms claimed that that waivers are used in up to 20 % of both merger and cartel cases, while others claimed that waivers are used very frequently in the merger setting and work very well, although they are used far less frequently in cartel and unilateral conduct cases.¹⁶³⁷ Parties to a merger have an interest in waiving confidentiality protection to enable free discussion among the authorities investigating the merger and thereby facilitating consistent analyses and compatible enforcement decisions.¹⁶³⁸ Due to the nature of a merger proceeding, which constitutes an authorization process whereby the parties benefit from a quick decision based on complete and correct data, cooperation is easier to achieve in merger review than cartel investigations. In the latter, companies are investigated regarding an alleged grave infringement of the law, and incentives to cooperate can therefore be less

¹⁶²⁹ Commission Report to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, 1 January 1999 to 31 December 1999, COM(2000) 618 final, 4 October 2000, 3.

¹⁶³⁰ OECD, Discussion on how to define confidential information, Contribution of the United States, DAF/COMP/WP3/WD(2013)55, 29 October 2013, 6.

¹⁶³¹ Report from the Commission to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws, 10 April 1995 to 30 June 1996, COM(96) 479 final, 8 October 1996, 10.

¹⁶³² ICN, Waivers of Confidentiality in Cartel Investigations – Explanatory Note, 2014, 4.

¹⁶³³ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 39.

¹⁶³⁴ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 97.

¹⁶³⁵ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 80.

¹⁶³⁶ Chatham House rules.

¹⁶³⁷ Result of author's law firm survey (see Annex I).

¹⁶³⁸ M. Błachucki & S. Józwiak, “Exchange of Information and Evidence between Competition Authorities and Entrepreneurs' Rights”, *Yearbook of Antitrust and Regulatory Studies*, Vol. 5, No. 6, 2012, 147-148.

present.¹⁶³⁹ Within the context of cartel investigations, there is one situation in which waivers are more regularly issued, namely in the event of a leniency application with at least two jurisdictions. The Commission confirms the use of waivers in the case of simultaneous leniency applications but remains silent on the frequency with which this occurs. It does ‘systematically’ ask for such waivers from the outset.¹⁶⁴⁰

Some notable examples of cases in which waivers were used are the 1994 *Microsoft* investigation, in which Microsoft granted a waiver to the US and EU authorities as it was easier for the company to deal with the two authorities together,¹⁶⁴¹ and the *Cisco/ Tandberg* merger, which was highlighted by both then-Assistant Attorney General VARNEY and then-Vice-President ALMUNIA “as a model for future cooperation and also a blueprint for how parties – both merging parties and third parties in that case – can facilitate cooperation with waivers.”¹⁶⁴² Waivers do not, however, always guarantee a ‘successful’ outcome. During the 2011 *Deutsche Börse/NYSE* merger for instance, the parties waived their confidentiality rights, allowing for close and frequent cooperation between both investigative staffs and the leadership of the DOJ and DG COMP. However, while in December 2011, the DOJ settled with the parties, a few months later the EU prohibited the merger based on differences in the markets in their jurisdictions. Cooperation nevertheless allowed the agencies to understand and anticipate each other’s investigations.¹⁶⁴³

4.1.1.2 Types of waivers

Experiences with waivers are quite extensive and overall positive. Cooperation based on waivers has generally been labelled as ‘excellent and very useful’.¹⁶⁴⁴ However, their content and use are not uniform throughout different jurisdictions, or even within one jurisdiction. One firm in response to the survey sent out in the framework of this study claimed that waivers work ‘ok’, but that there is no real standard and it is not entirely clear what really happens.¹⁶⁴⁵ Despite the existence of standard forms in certain agencies, the terms and conditions of confidentiality waivers are often negotiated on a case-by-case basis. ‘Personalisation’ occurs to a large extent.¹⁶⁴⁶ Such personalised negotiations, however, dispense lengthy explanations by counsel to leniency applicants on the scope of the waiver and the use of the relevant information.

Model waivers have therefore been developed. The most notable example is the ICN model leniency waiver template. It was rated as highly useful in the OECD/ICN Joint Survey,¹⁶⁴⁷ even though it was also felt that the ICN should better promote its model confidentiality waiver, given that some

¹⁶³⁹ OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Background Note, DAF/COMP/GF(2012)6, 13 February 2012, 3.

¹⁶⁴⁰ OECD, Global Forum on Competition, Improving international co-operation in cartel investigations, Contribution from the European Union, DAF/COMP/GF/WD(2012)53, 9 February 2012, 7.

¹⁶⁴¹ A. Jones & B. Sufrin, *EC Competition Law: Text, Cases and Materials*, 3rd ed., New York, Oxford University Press, 2008, 1391.

¹⁶⁴² OECD, Discussion on International Co-operation, Contribution of the United States, DAF/COMP/WP3/WD(2012)24, 12 June 2012, 7.

¹⁶⁴³ Ibid., 5.

¹⁶⁴⁴ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 12.

¹⁶⁴⁵ Result of author’s law firm survey (see Annex I).

¹⁶⁴⁶ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 13, 98.

¹⁶⁴⁷ Ibid., 98, footnote 142.

agencies do not use waivers and that some do not have a waiver model (and rely on waivers produced by the parties).¹⁶⁴⁸ While the EU makes reference to the ICN model waiver,¹⁶⁴⁹ it also has an ‘EU model waiver’ specifically for merger cases.¹⁶⁵⁰ The US authorities as well have published their own template to be used in international mergers and civil non-merger matters involving non-US competition authorities.¹⁶⁵¹ The US model waiver is a broad waiver, applying to all confidential information that the party provided to the competition authority. The main substantive difference between the US and ICN model waivers is that the US model waiver adds a provision regarding the treatment of privileged information.¹⁶⁵² A difference with the EU model waiver is that the US model waiver does not restrict the use of information obtained following the waiver to the proposed transaction, excluding any other purpose. The US waiver allows for use of the information in potential downstream investigations by competition authorities.¹⁶⁵³ While the EU on its merger webpage merely refers to the ICN website for more information on mergers,¹⁶⁵⁴ the US authorities have published a set of Frequently Asked Questions to highlight the benefits of signing a waiver. The FAQ moreover outlines the process for submitting a waiver, and clarifies the protection afforded to the information in the process. It is for instance clarified that if the FTC or the DOJ disclose information to a non-US competition authority, the updated model waiver provides that the confidential information is protected by the laws of the non-US authority supported by a common understanding with the US agencies, for instance a bilateral or multilateral agreement. In the reverse situation, the same level of protection under US laws will be provided as if the information had been directly requested and obtained by the FTC or DOJ.¹⁶⁵⁵ Such information-spreading practice is valuable as advocacy effort and should be taken up more broadly. Waiver templates potentially reduce the time and resources competition agencies and leniency applicants invest in negotiating waivers. They are, however, intended to address standard situations and often specific circumstances still require amendments.¹⁶⁵⁶

The fact that waivers are often tailored implies that many different kinds of confidentiality waivers exist. In the ICN model waiver it is clarified that its *“language is intended for those situations where a waiver with respect to any and all documents and information provided to Agency X is contemplated. There may be instances where such a broad waiver is not desired.”*¹⁶⁵⁷ Limited waivers are indeed possible, for instance only aimed

¹⁶⁴⁸ ICN Roundtable on Enforcement Cooperation, Roundtable Report & Questionnaire Response Summary, Washington, DC, 29 March 2011, 7-8.

¹⁶⁴⁹ See <http://ec.europa.eu/competition/ecn/mergers.html> (accessed June 2017).

¹⁶⁵⁰ European Commission Confidentiality Waiver, available at <http://ec.europa.eu/competition/mergers/legislation/npwaivers.pdf> (accessed June 2017).

¹⁶⁵¹ Available at <https://www.ftc.gov/policy/international/international-competition/international-waivers-confidentiality-ftc-antitrust> and <https://www.justice.gov/atr/file/705856/download> (accessed May 2015).

¹⁶⁵² Most relevant, when the privilege rules of the non-US authority are different from the privilege legislation in the US, the model waiver foresees that the US agencies will not seek information protected by US legal privilege from non-US competition authorities in the course of an exchange of confidential information. If such information is transferred to the FTC or DOJ nonetheless, it will be treated as an inadvertent production, and it will be returned or destroyed.

¹⁶⁵³ J.G. Krauss, R.F. Baldwin & D.E. Shulak, “FTC & DOJ release updated model confidentiality waiver for use in cross-border investigations”, *Hogan Lovells Antitrust, Competition and Economic Regulation Quarterly Newsletter*, Autumn 2013, 12.

¹⁶⁵⁴ See http://ec.europa.eu/competition/mergers/legislation/international_cooperation.html (accessed June 2017).

¹⁶⁵⁵ J.G. Krauss, R.F. Baldwin & D.E. Shulak, “FTC & DOJ release updated model confidentiality waiver for use in cross-border investigations”, *Hogan Lovells Antitrust, Competition and Economic Regulation Quarterly Newsletter*, Autumn 2013, 11.

¹⁶⁵⁶ ICN, *Waivers of Confidentiality in Cartel Investigations – Explanatory Note*, 2014, 2.

¹⁶⁵⁷ See <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/waiver.aspx> (accessed May 2017).

at allowing the agencies to discuss potential remedies, or in order to define the product market definition or barriers to entry. One particular distinction that can be made among waivers, as occurs in Canada, and as provided for on the ICN website for instance, is the one between full versus procedural waivers.¹⁶⁵⁸ Procedural waivers relate to the timing of key investigative events and the nature of cooperation¹⁶⁵⁹ and therefore allow competition agencies to coordinate on the procedural aspects of a cartel investigation, but do not allow for a substantive discussion between the listed competition agencies. They cover inter alia the identity of the leniency applicant or of the targets of the cartel investigation in a specific sector or the likely location of main evidence.¹⁶⁶⁰ Full waivers additionally permit competition agencies to discuss the content of information, evidence, records, or statements provided by cooperating parties and exchange substantive information.¹⁶⁶¹

4.1.1.3 Limitations

The use of waivers is not under the control of competition agencies. Agencies cannot mandate waivers, which remain at the discretion of the parties.¹⁶⁶² Whether or not a party is willing to sign a confidentiality waiver, or to waive such rights orally, depends to an extent on the trust between the competition agency and the leniency applicant or more generally the undertaking under investigation.¹⁶⁶³ Whether or not agencies will be able to fully discuss a case therefore depends on the goodwill of the parties, who will only denounce their confidentiality rights when it is in their own best interest to do so.¹⁶⁶⁴ Authorities may try to incentivise the granting of waivers, however. The Canadian Competition Bureau for instance will expect a confidentiality waiver in the event of similar requests for leniency in several jurisdictions unless there are compelling reasons not to, and will favourably evaluate an applicant's willingness to provide such a waiver when considering the value of cooperation provided by an applicant. A majority of respondents to the ICN/OECD Joint Survey indicated that they actively seek waivers from undertakings, while others refrained from doing so. Five respondents made leniency conditional on the grant of a waiver, in one case a marker was made conditional on the grant of a waiver.¹⁶⁶⁵

One reason for not granting a waiver is the fact that this results to a certain extent in loss of full control of the information flow, causing concerns regarding the use of waived information in private litigation, or in other words potential third party damage claims later on facilitated by different local document production rules.¹⁶⁶⁶ Parties may be reluctant to grant a waiver because they worry about the scope of the waiver, which may be perceived as disproportionately large, or they may have concerns regarding waivers with newer agencies because of unfamiliarity and inexperience with these

¹⁶⁵⁸ Ibid.

¹⁶⁵⁹ But is not required for competition agencies to discuss dates and time of envisaged inspections.

¹⁶⁶⁰ ICN, Waivers of Confidentiality in Cartel Investigations – Explanatory Note, 2014, 4.

¹⁶⁶¹ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 99; ICN, Waivers of Confidentiality in Cartel Investigations – Explanatory Note, 2014, 3.

¹⁶⁶² OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 101.

¹⁶⁶³ ICN, Waivers of Confidentiality in Cartel Investigations – Explanatory Note, 2.

¹⁶⁶⁴ See, for instance, OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 310-311.

¹⁶⁶⁵ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 98-99.

¹⁶⁶⁶ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 25.

agencies' confidentiality protections.¹⁶⁶⁷ The lack of a waiver may also be justified for instance in case leniency programmes in different jurisdictions are not coordinated and the criteria for granting leniency are different.¹⁶⁶⁸ During the ICN Roundtable on Enforcement Cooperation, some participants opined that bilateral cooperation agreements can provide some comfort to parties considering whether or not to grant a waiver, as such agreements can re-affirm a jurisdiction's confidentiality commitments.¹⁶⁶⁹

A consequence of this dependency is that the negotiations surrounding waivers may result in costly delays in the process,¹⁶⁷⁰ either as a result of strategic behaviour, or simply lengthy negotiations on the terms and conditions of the waiver. According to one respondent of the OECD/ICN Joint Survey, "[s]ome parties provide the [agency] with waivers that are based on another jurisdiction's standard confidentiality waiver. This kind of waiver often does not accord with the terms required by the [agency]. Seeking to arrange acceptable waivers can result in substantial delays and tie up a disproportionate amount of resources."¹⁶⁷¹ When deciding whether or not to sign a waiver, the party concerned must be informed of the relevant differences in laws of the jurisdictions involved in the case, such as confidentiality or privilege laws, as this may require adding or modifying provisions in the model waiver. Apart from delays coming from information costs, parties may simply believe that delaying the decision on whether to provide a waiver is appropriate in their particular situation. Arguments made in one jurisdiction may adversely impact those to be presented in another. Providing a waiver therefore constitutes a strategic legal decision that is highly dependent on the facts of the case.¹⁶⁷²

Independent procedural hiccups may result in waiver delays. In Canada for instance a late marker in an international cartel investigation resulted in delayed waivers from leniency applicants, in turn preventing the Canadian Competition Bureau from executing search warrants and document production orders in coordination with other competition agencies. Generally the Bureau will require leniency applicants to provide a waiver as soon as evidence is being provided to another jurisdiction.¹⁶⁷³ Such delays in turn result in a lack of predictability in the timing of the exchange of key information and difficulties where investigations are at different stages.¹⁶⁷⁴

Another limitation is that the exchange or discussion of information will be restricted to the terms of the waiver, which may vary on a case by case basis, as mentioned before, and evidently needs to be concluded for every case again.¹⁶⁷⁵ Often a general limitation is that the waiver is confined to information submitted by the parties, but this seems to be stretched to internal documents that

¹⁶⁶⁷ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 100.

¹⁶⁶⁸ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 23.

¹⁶⁶⁹ ICN Roundtable on Enforcement Cooperation, Roundtable Report & Questionnaire Response Summary, Washington, DC, 29 March 2011, 7-8.

¹⁶⁷⁰ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 79.

¹⁶⁷¹ Ibid., 100.

¹⁶⁷² J. Krauss, R. Baldwin III & D. Shulak, "FTC & DOJ release updated model confidentiality waiver for use in cross-border investigations", *Hogan Lovells Antitrust, Competition and Economic Regulation Quarterly Newsletter*, Autumn 2013.

¹⁶⁷³ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 99.

¹⁶⁷⁴ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 12.

¹⁶⁷⁵ ICN, Agency Effectiveness Project on Investigative Process – Competition Agency Confidentiality Practices, April 2014, 36.

mention the submitted information.¹⁶⁷⁶ Even then, it was recognised that a broader authority to exchange confidential information would be desirable as confidentiality waivers only cover a limited amount of information.¹⁶⁷⁷

The fact that waivers may have a rather limited scope leads to the fact that even with waivers, suboptimal communication may occur. The differing terms and conditions in waivers may result in restrictions in the allowed exchange of information between agencies. This risk is particularly present when waivers diverge to a significant extent from the standard waiver form of the jurisdiction, if such a form is even in place. Suboptimal communication will also occur when parties do not provide waivers to all the agencies involved in the investigation of the case, resulting in coordination problems. In the OECD/ICN Joint Survey the need to further standardise the scope of waivers, and the terms and conditions under which information may be exchanged was identified as an area of possible improvement to the waiver system.¹⁶⁷⁸ Second generation agreements therefore still offer added value as they allow a broader spectrum of communication to take place, and do not necessitate case-by-case negotiations about the scope of information exchange as waivers do.

Finally, there is something to say on the legal value of waivers. While confidentiality waivers define the conditions under which the authority receiving the waiver can exchange confidential information with another authority, the Commission indicated that there is a risk that *“the authority receiving information under that waiver could invoke national legislation in order to argue that it can use the information for other purposes [...]”*¹⁶⁷⁹ Evidently, if the waiver system is to be fully effective, companies should be reassured that the conditions set out in the waiver will be respected.¹⁶⁸⁰

While waivers certainly are a useful tool, they are not always available,¹⁶⁸¹ and when they are, they are nevertheless plagued by some inherent limitations and therefore cannot fully substitute second generation agreements. International cooperation can play a role in aligning the model waivers more, so that the use and negotiation of waivers becomes even more attractive. Bilateral agreements could also promote the use of waivers, and the use of waivers may lead to more trust in the cooperation process, which leads to a mutually reinforcing dynamic.

4.1.2 Unilateral ‘gateway provisions’

4.1.2.1 Definition

¹⁶⁷⁶ See for instance the ICN Model Waiver.

¹⁶⁷⁷ OECD, International Co-operation – Stocktaking Exercise of the Competition Committee’s Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 37. *“For example, where a competition authority obtains documents during a dawn raid that was triggered by information provided by a leniency applicant, any such documents are usually still subject to confidentiality protections and cannot be shared with authorities in other jurisdictions.”* In 2002 the Committee published a report on ‘Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes’, OECD, International Co-operation – Stocktaking Exercise of the Competition Committee’s Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 37-38.

¹⁶⁷⁸ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 100-101.

¹⁶⁷⁹ OECD, Discussion on Limitations and Constraints to International Co-operation, Contribution of the European Union, DAF/COMP/WP3/WD(2012)41, 23 October 2012, 4.

¹⁶⁸⁰ Ibid., 4.

¹⁶⁸¹ This problem ranked 3rd in terms of importance and 6th in terms of frequency among the respondents of the OECD/ICN Joint Survey. OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 79.

‘Information gateway’ provisions are legal provisions that allow confidential information exchange between competition authorities without the need for prior consent from the source of the information. Such provisions may take the form of national law provisions.¹⁶⁸² Indeed, rather than concluding multi- or bilateral cooperation agreements, some jurisdictions unilaterally provide for so-called gateway provisions.

The domestic legislation in the UK, Australia, Canada, the Netherlands and Germany for instance has provisions enabling the exchange confidential information with other competition agencies without consent of the interested parties or the need to enter into cooperation agreements.¹⁶⁸³ In Canada, Section 29 of the Competition Act is the key provision in this regard, further elaborated upon in the Competition Bureau’s 2007 Bulletin on the Communication of Confidential Information under the Act.¹⁶⁸⁴ The Act distinguishes between information exchanged under a bilateral or multilateral cooperation instrument, which will be subject to the specific confidentiality safeguards contained in that instrument, and information exchanged in absence of such an agreement, where as a matter of practice the Bureau “*will consider the communication of information only after it is fully satisfied of the assurances provided by the foreign agency with respect to the confidentiality and use of the communicated information.*”¹⁶⁸⁵ The Competition Act also allows the extension of mutual legal assistance beyond cartel cases and the provision of legal assistance to jurisdictions in which cartels are not treated as criminal conduct.¹⁶⁸⁶ In Germany, paragraphs 50a and 50b of the Act Against Restraint of Competition allow the Bundeskartellamt to cooperate with ECN agencies and other agencies respectively, including the exchange of confidential information. In the UK Part 9 of the 2002 Enterprise Act provides for a statutory overseas information gateway, allowing the UK Office of Fair Trading and Competition Commission to voluntarily disclose information gathered under their statutory powers of investigation, to facilitate the exercise by an overseas authority of any function relating to the purposes of civil or criminal antitrust cases in those jurisdictions. Exchange of information is allowed either where a ‘gateway’ exists in the Enterprise Act or where disclosure is permitted under other legislation.¹⁶⁸⁷ The Dutch competition law regime allows the national competition authority to exchange information obtained during the course of an investigation with foreign competition authorities provided that the confidentiality of the information is sufficiently protected, and adequate assurance is given that the information will not be used for any purpose other than that for which it is provided, and finally, and quite remarkably, when disclosure of the information in question is in the interest of the Dutch economy.¹⁶⁸⁸ In Australia, the ACCC, finally, is allowed to coordinate competition investigations with its counterparts and to comply with

¹⁶⁸² OECD, Inventory of co-operation agreements, Note by the secretariat, DAF/COMP/WP3(2015)12/REV1, 20 November 2015, 14-15.

¹⁶⁸³ This list was exhaustive in 2014. OECD, National and International Provisions for the exchange of confidential information between competition agencies without waivers, Note by the secretariat, DAF/COMP/WP3(2013)4, 2 October 2014, 2.

¹⁶⁸⁴ OECD, National and International Provisions for the exchange of confidential information between competition agencies without waivers, Note by the secretariat, DAF/COMP/WP3(2013)4, 2 October 2014, 2, 5.

¹⁶⁸⁵ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 13.

¹⁶⁸⁶ Ibid.

¹⁶⁸⁷ OECD, National and International Provisions for the exchange of confidential information between competition agencies without waivers, Note by the secretariat, DAF/COMP/WP3(2013)4, 2 October 2014, 7-8. This provisions may come to play a larger role when the Brexit occurs, as the OFT will likely no longer be a part of the ECN.

¹⁶⁸⁸ Article 91 Dutch Competition Act, Act of 22 May 1997, Providing New Rules for Economic Competition, available at <http://www.dutchcivillaw.com/legislation/competitionact.htm> (accessed June 2017). Also see M. Dabbah, “Future directions in bilateral cooperation: A policy perspective” in A. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 295.

information requests, including via the disclosure of protected information under Section 155AAA of the 2010 Competition and Consumer Act.¹⁶⁸⁹ It is not compelled, however, to comply with a request for disclosure of protected information. The Mutual Assistance in Business Regulation Act of 1992 (MABRA) moreover allows business regulators, such as the ACCC, to assist peers with evidence gathering, such as compelling the production of documents or requiring a person to give oral evidence, but does not allow the business regulator to release information. A formal request for assistance is considered by the ACCC and referred to the Australian Government. Assistance is then authorized by the Attorney General if it is in Australia's best interests and consistent with international law and comity.¹⁶⁹⁰ Under this act, information exchanged may not be used in criminal proceedings. For this type of information exchange the 1987 Mutual Assistance in Criminal Matters Act applies. Referral to both acts is necessary in cases where breaches of foreign antitrust law may result in both civil and criminal sanctions.¹⁶⁹¹

4.1.2.2 Variation

Information gateways can take many forms. A first vector along which they can vary is the amount of discretion given to the competition agencies to disclose or withhold information under the gateway provision. This ranges from being quite broad in the Canadian and Australian legislation to narrower scopes in the German and UK gateways, which regulate in detail the conditions that must be fulfilled for the transmission of information to be allowed.¹⁶⁹² The OECD/ICN Joint Survey revealed that the transmission of confidential information under an information gateway is generally conditional upon one or more of the following criteria: the seriousness of the offence, the existence of adequate downstream protections, the availability of reciprocal treatment, the importance and need for the disclosure in the receiving jurisdiction, the existence of rule of law in the receiving jurisdiction, and the existence of restrictions on the use of the received information.¹⁶⁹³

The ACCC may for instance decide on a discretionary basis whether disclosure to a foreign authority would enable or assist the body to perform its functions, or exercise its powers, and whether it is appropriate to disclose the information (or according to which conditions) in the circumstances. The Act does not specify any further factors to be taken into account by the ACCC when deciding whether or not to disclose. The ACCC's policy indicates that such factors include Australia's relations with other countries and the impact of disclosure on domestic and international cartel programmes, such as the ACCC's leniency policy,¹⁶⁹⁴ as well as the confidentiality laws in the requesting country, the purpose of the request, and any existing agreements or arrangements with the requesting country or authority. A policy exception is that the Bureau will not disclose leniency information to a foreign agency without consent of the applicant. As mentioned, however, a waiver

¹⁶⁸⁹ OECD, National and International Provisions for the exchange of confidential information between competition agencies without waivers, Note by the secretariat, DAF/COMP/WP3(2013)4, 2 October 2014, 3.

¹⁶⁹⁰ Section 155AAA of the Competition and Consumer Act 2010, as cited in OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 36. Also see OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Contribution from New Zealand, DAF/COMP/GF/WD(2012)14, 19 December 2011, 4.

¹⁶⁹¹ OECD, National and International Provisions for the exchange of confidential information between competition agencies without waivers, Note by the secretariat, DAF/COMP/WP3(2013)4, 2 October 2014, 5.

¹⁶⁹² Ibid., 3.

¹⁶⁹³ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 91.

¹⁶⁹⁴ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 36-37.

will be expected absent compelling reasons. The source of the information and relevant third parties are notified if required by the principles of natural justice or otherwise required by law. Australia's legal professional privilege protection regime remains in place.¹⁶⁹⁵

In the UK on the other hand, the Enterprise Act sets out in detail the factors that must be taken into account when the competition agency is considering to disclose information to a foreign authority: *“(a) whether the matter in respect of which the disclosure is sought is sufficiently serious to justify making the disclosure; (b) whether the law of the country or territory to whose authority the disclosure would be made provides appropriate protection against self-incrimination in criminal proceedings; (c) whether the law of that country or territory provides appropriate protection in relation to the storage and disclosure of personal data; (d) whether there are arrangements in place for the provision of mutual assistance as between the United Kingdom and that country or territory in relation to the disclosure of information of the kind to which section 237 applies.”*¹⁶⁹⁶ The Secretary of State can furthermore oppose permitted disclosure if he considers that, relating to any matter in respect of which the disclosure could be made, it is more appropriate that a potential investigation is carried out by a UK or an authority in another specified territory or that such investigation is brought in a court in the UK or in another specified territory.¹⁶⁹⁷

Some gateway provisions may be very detailed regarding the use that the receiving agency can make of the transmitted information. This constitutes a second vector of variation. This may either be determined by statute, or the transmitting agency may be left to decide whether to subject the transmission of the information to limitations on use, as is the case in for instance Australia, where the Chairman (or his delegate) may impose conditions on further disclosure of and dealing with the protected information. Information will normally not be disclosed if the Bureau is not certain that the confidentiality of the information will be maintained, and that the information will not be used beyond the purpose for which it was communicated. Standard conditions further include notification by the receiving authority of the ACCC of any third party request which relates, or may relate to the protected information as well as of any proposed use of the information in court proceedings, and a prohibition to disclose the information without the ACCC's prior written consent, unless required to do so by law.¹⁶⁹⁸ In Germany the Bundeskartellamt must guarantee that the receiving agency uses the information only for the enforcement of competition rules and only for the purpose for which the information was collected.¹⁶⁹⁹ The receiving agency must also ensure the protection of confidential information and seek the Bundeskartellamt's agreement if it considers to transmit the information to third parties. In the UK, information may be exchanged to facilitate the exercise by the overseas public authority of its law enforcement functions. The Office of Fair Trade may, but is not obliged to subject the transmitted information to the conditions that the information disclosed must not be further disclosed without the agreement of the discloser, and must not otherwise be used for any purpose other than that for which it was first disclosed.¹⁷⁰⁰

¹⁶⁹⁵ OECD, National and International Provisions for the exchange of confidential information between competition agencies without waivers, Note by the secretariat, DAF/COMP/WP3(2013)4, 2 October 2014, 4, 7.

¹⁶⁹⁶ Section 29(6) 2002 Enterprise Act. Also see OECD, National and International Provisions for the exchange of confidential information between competition agencies without waivers, Note by the secretariat, DAF/COMP/WP3(2013)4, 2 October 2014, 9.

¹⁶⁹⁷ Ibid.

¹⁶⁹⁸ OECD, National and International Provisions for the exchange of confidential information between competition agencies without waivers, Note by the secretariat, DAF/COMP/WP3(2013)4, 2 October 2014, 3-6.

¹⁶⁹⁹ Ibid., 8.

¹⁷⁰⁰ Ibid., 8-9.

Another vector along which gateway provisions may vary is the scope of information exchange they allow. Indeed, some gateways explicitly exclude certain types of information, or subject their exchange to stricter conditions. This is for instance the case for information received through a leniency program, as in Canada, self-incriminating information, as in the UK, or privileged information, as in Australia. Sometimes such an exclusion is determined in advance by the statute, other times this decision is left to the transmitting agency depending on the existing safeguards in the receiving jurisdiction. In Germany merger information is excluded from being exchanged under the gateway provisions, and can be transmitted only with consent of the parties. Finally, some gateway provisions require reciprocal treatment as a condition for the use of the gateway, such as those in the UK, while others do not.¹⁷⁰¹

4.1.2.3 Limitations

The benefit of unilateral gateway provisions is that there is no risk of ending up with an entanglement of bilateral agreements. However, they do not provide great transparency for undertakings. There is little information publicly available about the actual use of unilateral information gateways. The provisions do not seem to be used very frequently. One explanation put forward is that the enforcement of such provisions is quite burdensome due to the considerations that the disclosing agency must make in relation to each disclosure, for instance whether the disclosure of confidential information is necessary in the context of another agency's case. It may take a long time before an exchange under a unilateral gateway provision is triggered, which may undermine their practical use.¹⁷⁰² They hold potential to form a full-fledged alternative for second generation agreements, but have their own limitations as well. Unilateral gateway provisions do not seem to offer substantial benefits in comparison to bilateral agreements. In the EU it would require new legislation. A treaty-change is likely not required, as a potential gateway provision could be included in regulation 1/2003. A delegated act drawn up by the Commission could draw up a list of countries with which information could be exchanged among the competition authorities, annexed to the regulation.¹⁷⁰³ In any event the Commission cannot decide on Union policy, even in non-binding MoUs (see below, Part II, 4.1.4).¹⁷⁰⁴

4.1.3 'Enhanced cooperation mechanisms'

The OECD recently engaged in a discussion on 'enhanced enforcement cooperation'.¹⁷⁰⁵ 'Enhanced cooperation' was defined in the OECD/ICN Joint Survey as *"identifying a lead enforcement agency, setting up joint investigative teams, or entering into work sharing arrangements. Enhanced cooperation does not involve a withdrawal of jurisdiction over a case; parallel enforcement action can be taken by more than one agency if one agency is not in a position to safeguard the interests of the other jurisdiction(s) affected."*¹⁷⁰⁶ This definition seems overly restrictive, however. In practice, experience related to joint inspections and interviews, conducting

¹⁷⁰¹ Ibid., 3, 8.

¹⁷⁰² The Australian ACCC indicated the use of information gateways in the Marine Hose case and the Fine Paper case. Ibid., 17.

¹⁷⁰³ As was done in a similar manner in the old Europol-Regulation.

¹⁷⁰⁴ While the Commission is exclusively competent with regard to EU competition policy, this is not the case for EU external relations policy.

¹⁷⁰⁵ See <http://www.oecd.org/daf/competition/enhanced-enforcement-cooperation.htm> (accessed June 2017).

¹⁷⁰⁶ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 53.

interviews in another's agency territory and joint negotiations and/or design of remedies.¹⁷⁰⁷ In the OECD's most recent discussion, three main tracks surfaced: cooperation among courts, mutual recognition, and a lead agency model.¹⁷⁰⁸ These solutions are not new and have been mentioned in the past, for instance in the 2000 ICPAC Report, but their feasibility has never been thoroughly reviewed by the Committee.¹⁷⁰⁹ The survey further exposed that currently, outside of formal regional networks, enhanced cooperation is limited to only a small number of agencies,¹⁷¹⁰ often, and not surprisingly, among agencies having a good prior relationship. An even smaller percentage of agencies indicated having successful experiences.¹⁷¹¹

4.1.3.1 Cooperation among courts

Currently, binding and enforceable rules regarding international cooperation among courts do not exist, due to lack of agreement on what those rules should be. Informal cooperation mechanisms have therefore been developed to somewhat remedy the situation, in the form of the common law *forum non conveniens* doctrine for instance, which allows a court to decline to rule over a case in the event that a court in another jurisdiction would be substantially better placed to do so, although it is not clear whether this doctrine can be applied to competition cases according to the OECD. Another option is the *lis pendens* doctrine, which “allows courts to stay proceedings when a similar dispute on the same or a related matter is already pending in foreign court.”¹⁷¹² It is unsure whether all competition cases could fall under the mechanism developed in the Hague Convention on Service of Process in Civil and Commercial Matters, allowing national courts to request and receive judicial documents from a foreign court in a simpler way than via letter rogatory. It is questioned whether competition law cases can generally be included in the category of ‘civil and commercial matters’,¹⁷¹³ likely because of the hybrid nature of the legal branch, with both (quasi-)criminal and administrative aspects.

Within the EU, since 2002, there exists an Association of European Competition Law Judges (AECLJ). The Association is made up of judges from EU Member States who hear cases in their national courts involving both national and European competition law. Its main aim is “to promote knowledge and understanding of competition policy and law issues throughout the respective judiciaries of the Member States.”¹⁷¹⁴ A founding group of judges representing each of the then fifteen Member States of the EU at the time created the AECLJ in Luxemburg, with the participation of judges from the European Courts and the EFTA Court. The AECLJ provides a forum for the exchange of knowledge and experience, and discuss issues of common concern and best practice, in an effort to promote coherence and consistency, particularly in the context of the modernisation of the application of former Articles 81 and 82 under Regulation 1/2003, and more generally a consistent application of European competition law. It was created to mirror the regular meetings between the national competition authorities in the EU under the auspices of the ECN, as at the time no similar

¹⁷⁰⁷ Ibid., 54.

¹⁷⁰⁸ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 53.

¹⁷⁰⁹ OECD, International Co-operation – Stocktaking Exercise of the Competition Committee’s Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 15.

¹⁷¹⁰ 16% Of respondents indicated having experience of this kind.

¹⁷¹¹ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 53.

¹⁷¹² OECD, Summary of discussion of the hearing on enhanced enforcement cooperation, DAF/COMP/WP3/M(2014)2/ANN2/FINAL, 7 November 2014, 2-3.

¹⁷¹³ Ibid.

¹⁷¹⁴ See <http://www.aeclj.com/> (accessed June 2017).

institutional arrangement was established for national judges, even though in other fields of harmonised law the European Commission organised conferences where judges could engage. Contrary to the cooperation in the ECN, however, no case-cooperation takes place within the AECLJ. The Commission being a competition agency itself, had to keep appropriate distance between itself and the European judiciary. Nevertheless, as EU competition law is applied by national judges, it is pivotal that there is a forum where such judges are able to communicate informally, discussing matters of common concern and enquiring about parallel proceedings.¹⁷¹⁵

4.1.3.2 Mutual recognition

International judicial cooperation also extends to the reliance on and enforcement of foreign judgments and decisions. Currently, a general multilateral treaty in this regard is lacking. In particular in competition law proceedings, such cooperation can be difficult, as for instance the enforcement of behavioural injunctions is more difficult than the enforcement of a monetary judgment.¹⁷¹⁶ If one looks at the US legal system, it becomes clear that judicial cooperation is difficult to achieve even within one nation.¹⁷¹⁷

A ‘recognition of judgments mechanism’, meant to function as a form of international collateral estoppel was suggested by GAL.¹⁷¹⁸ The suggested system would allow domestic courts and antitrust authorities to rely on the factual findings in a foreign international hard-core cartel decision for their own decisions, provided that such reliance meets certain fairness and reasonableness criteria. While the mechanism is focused on the fight against international cartels, it could be extended to international abuse of market dominance cases and to some extent to merger decisions, but the application would be more difficult due to larger divergences in substantive competition laws. This system intends to reduce the resource constraint problem, both in terms of finances as in terms of human capital, by allowing jurisdictions to skip the allegedly costliest and most difficult stage in a cartel trial, namely to prove the very existence of an international cartel. The system is not entirely theoretical. In the *Vitamins Cartel* decision, the Brazilian competition authority relied on the findings concerning the worldwide cartel by US and EU antitrust authorities and treated these findings as facts, or factual documents. These findings were then corroborated with import data of the various types of vitamins imported by the alleged cartelists into Brazil, allowing the imposition of appropriate fines.¹⁷¹⁹ Delegation of decision-making to foreign bodies can furthermore be found in the system adopted in the Patent Cooperation Treaty, with regard to patent applications made through the International Patent Office. Patent offices of several pre-specified jurisdictions are designated as international searching authorities, which search for prior art that might block the patent application. Other domestic patent offices may then base their factual findings on those of the searching authorities when the applicant requests a domestic patent. The factual findings of a searching

¹⁷¹⁵ See <http://www.aecj.com/240/About-the-Association.html> (accessed June 2017).

¹⁷¹⁶ OECD, Summary of discussion of the hearing on enhanced enforcement cooperation, DAF/COMP/WP3/M(2014)2/ANN2/FINAL, 7 November 2014, 2-3.

¹⁷¹⁷ OECD, Hearing on Enhanced Enforcement Cooperation, Paper by Chief Judge Diane P. Wood, “Enhanced international cooperation in competition cases: the role of the courts”, DAF/COMP/WP3(2014)5, 26 May 2014, 3.

¹⁷¹⁸ OECD, Hearing on Enhanced Enforcement Cooperation, Paper by Prof. Michal S. Gal, “Increasing deterrence of international cartels through reliance on foreign decisions”, DAF/COMP/WP3/(2014)4, 24 June 2014.

¹⁷¹⁹ OECD, Hearing on Enhanced Enforcement Cooperation, Paper by John Temple Lang, “Aims of enhanced international cooperation in competition cases”, DAF/COMP/WP3(2014)7, 28 May 2014, 2-13.

authority, which constitutes a decision of a foreign patent institution, may therefore be binding in other jurisdictions.¹⁷²⁰

Informal acceptance by one agency of the decisions of another would amount in practice to mutual recognition. The system according to GAL should never be mandatory, as this seems unfeasible (for instance with regard to enforcement and contestability).¹⁷²¹ In any event this system requires guarantees of due process and assurances of strict judicial review among the participants.¹⁷²² Indeed, it is crucial that the foreign decision meets certain fairness criteria of both substantive and procedural nature. GAL suggested *inter alia* that the decision should be made in accordance with the foreign law and should be final, that the foreign court should meet judicial competence requirements and the defendant should have a full and fair opportunity to litigate the issue, and that the foreign decision should not be used as basis for criminal prosecutions in the adopting jurisdictions.¹⁷²³ These conditions were drawn by analogy from the conditions set in international treaties and domestic laws with regard to the application and enforcement of foreign decisions as well as the doctrine of collateral estoppel.¹⁷²⁴

This purely voluntary mechanism is limited in the sense that authorities would still have to prove the effect on their national markets, which can remain difficult. Some also claim that mutual recognition that is limited to findings of fact and not legal assessments is first of all not useful and second of all very difficult as findings of fact cannot always be separated from legal conclusions, in particular in competition cases.¹⁷²⁵ Reliance on factual information may moreover be achieved via traditional cooperation and discussion. It might also potentially lead to delays in stopping cartel infringements due to the risk that agencies would wait until other jurisdictions have made a decision eligible for recognition. The system would moreover require legislative reforms allowing the national competition agency or courts to give appropriate weight to judgments of foreign courts or decisions of foreign agencies without necessarily being bound by them.¹⁷²⁶ It may also encounter political objections resulting from two concerns: that a foreign decision harms sovereignty and that the incentives of the foreign decision maker are skewed knowing that his decision might apply beyond his borders. Other concerns identified by GAL relate to over-and under-enforcement, fairness considerations, negative political externalities, and, again, reduced incentives to participate in leniency programs. With regard to this last obstacle, it is suggested to arrange the mechanism in such a way that firms enjoying leniency in the origin country would enjoy similar leniency in the adopting

¹⁷²⁰ OECD, Hearing on Enhanced Enforcement Cooperation, Paper by Prof. Michal S. Gal, “Increasing deterrence of international cartels through reliance on foreign decisions”, DAF/COMP/WP3/(2014)4, 24 June 2014, 6-7.

¹⁷²¹ It should be noted, however, that the EU Damages Directive foresees in its Article 9 on the effect of national decisions that “*an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law.*” Such a final decision may, in accordance with national law, be presented before the national courts of the member states “*as at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties.*”

¹⁷²² OECD, Hearing on Enhanced Enforcement Cooperation, Paper by John Temple Lang, “Aims of enhanced international cooperation in competition cases”, DAF/COMP/WP3(2014)7, 28 May 2014, 2-13.

¹⁷²³ OECD, Summary of discussion of the hearing on enhanced enforcement cooperation, DAF/COMP/WP3/M(2014)2/ANN2/FINAL, 7 November 2014, 4.

¹⁷²⁴ OECD, Hearing on Enhanced Enforcement Cooperation, Paper by Prof. Michal S. Gal, “Increasing deterrence of international cartels through reliance on foreign decisions”, DAF/COMP/WP3/(2014)4, 24 June 2014, 4.

¹⁷²⁵ OECD, Hearing on Enhanced Enforcement Cooperation, Paper by John Temple Lang, “Aims of enhanced international cooperation in competition cases”, DAF/COMP/WP3(2014)7, 28 May 2014, 13, footnote 13.

¹⁷²⁶ OECD, Summary of discussion of the hearing on enhanced enforcement cooperation, DAF/COMP/WP3/M(2014)2/ANN2/FINAL, 7 November 2014, 5.

country, on the condition that the leniency applicant provides the domestic competition authority with all relevant information concerning the application of the cartel and its harm in the domestic jurisdiction. If this is not granted, it is said that the foreign decision maker can also specifically limit the breadth of his decision, so it would be difficult to apply in other jurisdictions.¹⁷²⁷ A lot of hurdles must be overcome for the system to be put in place, but such cooperation could significantly advance international competition law enforcement. It is an aspect of cooperation that is entirely missing from bilateral cooperation agreements as they stand today.

4.3.1.3 Lead Jurisdiction Concepts

One idea that repeatedly surfaces in the debate on international cooperation in competition matters, often raised by the business community, is the ‘lead agency’ approach, aimed at reducing the complexity of multi-jurisdictional enforcement. The idea surfaced in an environment where international enforcement cooperation is no longer aimed at mere prevention of conflict but rather at the creation of efficiencies. Mechanisms for determining enforcement priority could be introduced, for instance letting ‘the best placed’ jurisdiction investigate a case rather than all affected jurisdictions acting in parallel.¹⁷²⁸ Some claim that informal lead-agency models are already employed in practice, but it is likely that this refers to an intense form of traditional cooperation more than a real lead jurisdiction model (see below, Part II, 4.3.1.3, B). It is often mentioned that this type of advanced cooperation should be explored and tested by experienced older agencies, who have to lead the way and trust each other to do the work.¹⁷²⁹

A) Definition

In order to overcome some of the difficulties related to traditional and positive comity, the concept of ‘enhanced comity’ emerged in the late 1990s – early 2000s. This concept relates to the organisation of different types of work sharing arrangements, such as joint investigations, but also a ‘lead agency’ model.¹⁷³⁰ The American Bar Association named three principles of enhanced comity: non-binding deference to jurisdictions with greater interest in the case, avoidance of inconsistent remedies, and coordination of parallel proceedings.¹⁷³¹ Following these principles “*jurisdiction should be allocated to the state whose competition regime is best equipped to establish an infringement and enforce any sanctions or remedies.*”¹⁷³² A lead agency model was also among the ‘work-sharing’ recommendations of the US ICPAC for improving international cooperation.¹⁷³³ Tax authorities have already successfully applied

¹⁷²⁷ OECD, Hearing on Enhanced Enforcement Cooperation, Paper by Prof. Michal S. Gal, “Increasing deterrence of international cartels through reliance on foreign decisions”, DAF/COMP/WP3/(2014)4, 24 June 2014, 6-11.

¹⁷²⁸ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 14, 55, 317.

¹⁷²⁹ “Crossing Merger Control Frontiers: What are the new borders?”, 3rd Annual conference organized by Concurrences and Paul Hastings, Paris, 30 October 2015.

¹⁷³⁰ OECD, International Co-operation – Stocktaking Exercise of the Competition Committee’s Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 17.

¹⁷³¹ B. Sweeney, “International Competition Law and Policy: A Work in Progress”, *Melbourne Journal of International Law*, Vol. 10, 2009, 68, fn. 41.

¹⁷³² OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 24.

¹⁷³³ International Competition Policy Advisory Committee Antitrust Division, ICPAC Final Report, 2000, <http://www.library.unt.edu/gpo/ICPAC/finalreport.htm> (accessed September 2015).

the mechanism in their international cooperation efforts.¹⁷³⁴ With regard to antitrust, the system already exists as well in a national form in the US, where the so-called Judicial Panel on Multidistrict Litigation, that was established already in 1968, entails the option of combining parallel antitrust procedures among US states into a single one.¹⁷³⁵ A ‘lead agency’-model is also included in the ECN (see below, 2.1.5.1, D).

The basic idea of a ‘lead jurisdiction’ model is indeed to identify the jurisdiction which is best placed to investigate a particular international case and to designate it to handle and decide on the case on behalf of all affected jurisdictions, with the intention to reduce the (transaction and regulatory) costs and risks inherent to multiple parallel proceedings, such as inefficiencies and inconsistent enforcement actions. The model therefore introduces a form of ‘common procedure’ led by one competition authority, rather than having multiple uncoordinated procedures.¹⁷³⁶ The ICPAC suggested that the forum having the most contacts with the case would analyse the benefits and harms of the whole merger, host interventions by other involved jurisdictions, and grant relief able to cure problems worldwide ‘as if the world were in its nation’. It further opined that best or recommended practices could be worked out in the ICN, while the required extensions of law and process would need to be tackled on a national level.¹⁷³⁷ It was suggested by BUDZINSKI that a ‘threshold’ could be used in the form of an ‘x-plus rule’ of countries opening an independent review proceeding on a given case to determine when a multinational case would be potentially subject to the model. This rule would however also need to be refined according to the size of the relevant jurisdictions.¹⁷³⁸ The OECD suggested that one-stop mechanisms could be introduced in model cooperation agreements, for instance in the section dealing with coordination. More concretely, an agreement may stipulate for instance that one party will accept filings/applications on behalf of the other parties and notify such parties of the filings/applications right after reception of the latter. This ‘benefit’ for the applicant may be made conditional upon the granting of a full waiver to the authorities.¹⁷³⁹

B) Types of lead agency systems

Different lead jurisdiction mechanisms exist. The main distinction is between a voluntary model, also referred to as advanced comity *sensu stricto*, and a mandatory model. In a voluntary model the ‘lead jurisdiction’, or in competition cases more concretely, the lead agency, will take on the role of coordinator, compiling and distributing case-related information and coordinating the interests of the different agencies involved. The lead agency will develop a common non-binding draft decision (a recommendation) regarding remedies, which should contain a coherent treatment of the anticompetitive behaviour at stake, while integrating the competition-oriented interests of the participating jurisdictions. After the initial discussion on whether the case could be dealt with under

¹⁷³⁴ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 55.

¹⁷³⁵ O. Budzinski, “Lead jurisdiction concepts – towards rationalizing multiple competition policy enforcement procedures”, Ilmenau Economics Discussion Papers, Vol. 19, No. 87, June 2014, 3-4.

¹⁷³⁶ OECD, Summary of discussion of the hearing on enhanced enforcement cooperation, DAF/COMP/WP3/M(2014)2/ANN2/FINAL, 7 November 2014, 7.

¹⁷³⁷ E. Fox, “Antitrust without borders: from roots to codes to networks”, E15 Expert Group on Competition Policy and the Trade System Think Piece, November 2015, 6.

¹⁷³⁸ OECD, Summary of discussion of the hearing on enhanced enforcement cooperation, DAF/COMP/WP3/M(2014)2/ANN2/FINAL, 7 November 2014, 7.

¹⁷³⁹ OECD, Report/Inventory on provisions contained in existing international co-operation agreements, Note by the secretariat, DAF/COMP/WP3(2014), 16 December 2014, 24.

the lead agency model, this initial consensus does not commit the other agencies to accept the result. The other agencies can either opt-in or opt-out at any stage, deciding whether or not, or to what extent, they will participate and follow the model and adopt the recommendation of the lead jurisdiction or will proceed on their own, depending on how satisfactory they find the proceedings and the result. The reviews of other involved jurisdictions are not suspended, but are coordinated, thereby aiming to ensure mutual respect for each other's legitimate interests following the comity principle.¹⁷⁴⁰ The lead agency would also take care of the logistics of the cooperation by for instance setting up joint conference calls or meetings. This already happens occasionally. Companies could then reciprocate by indicating one leading law firm.¹⁷⁴¹ This 'soft' or 'informal' approach does not delegate any actual powers to the lead agency. The latter would merely exercise its own, but in very close cooperation with the other agencies involved.¹⁷⁴² In this voluntary system multiple parallel procedures are not completely eliminated, but potentially reduced and at least streamlined.¹⁷⁴³

The mandatory model functions as a true one-stop-shop, whereby the lead jurisdiction handles the overall case. While it is assisted by the other affected agencies, it leads the investigation and makes a binding decision, applying its own competition law. However, while deciding on the case, the lead agency should act in a non-discriminatory way and take into account the anti-competitive effects in all relevant geographic markets. It should consider the interests of all the non-lead jurisdictions, who are obliged to assist with the investigation, and to accept the final decision.¹⁷⁴⁴

C) Limitations

According to the OECD, the lead jurisdiction model gained little success so far, apart from its regional application within the ECN (see below, Part III, 2.1.5.1).¹⁷⁴⁵ Several explanations can be found. A first reason is that there is insufficient research and consensus on the practical aspects of the model. According to BUDZINSKI, "[a]t the end of the day, the concept of a multilevel lead jurisdiction model is far from being comprehensively researched and completely developed."¹⁷⁴⁶ TEMPLE LANG in turn claims that a formal lead agency approach "would be so complicated that it does not seem desirable."¹⁷⁴⁷ When a lead jurisdiction model is employed on an international scale this entails particular difficulties with regard to first, the selection and appointment of the lead jurisdiction for a given case, second, the

¹⁷⁴⁰ OECD, Hearing on Enhanced Enforcement Cooperation, Paper by Prof. Olivier Budzinski, "Towards rationalizing multiple competition policy enforcement procedures: the role of lead jurisdiction concepts", DAF/COMP/WP3(2014)6, 23 June 2014, 3-4.

¹⁷⁴¹ "Crossing Merger Control Frontiers: What are the new borders?", 3rd Annual conference organized by Concurrences and Paul Hastings, Paris, 30 October 2015.

¹⁷⁴² OECD, Hearing on Enhanced Enforcement Cooperation, Paper by John Temple Lang, "Aims of enhanced international cooperation in competition cases", DAF/COMP/WP3(2014)7, 28 May 2014, 6.

¹⁷⁴³ OECD, Summary of discussion of the hearing on enhanced enforcement cooperation, DAF/COMP/WP3/M(2014)2/ANN2/FINAL, 7 November 2014, 6; also see O. Budzinski, "Lead jurisdiction concepts – towards rationalizing multiple competition policy enforcement procedures", Ilmenau Economics Discussion Papers, Vol. 19, No. 87, June 2014, 3-4.

¹⁷⁴⁴ OECD, Summary of discussion of the hearing on enhanced enforcement cooperation, DAF/COMP/WP3/M(2014)2/ANN2/FINAL, 7 November 2014, 6.

¹⁷⁴⁵ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 24.

¹⁷⁴⁶ OECD, Hearing on Enhanced Enforcement Cooperation, Paper by Prof. Olivier Budzinski, "Towards rationalizing multiple competition policy enforcement procedures: the role of lead jurisdiction concepts", DAF/COMP/WP3(2014)6, 23 June 2014, 15.

¹⁷⁴⁷ OECD, Hearing on Enhanced Enforcement Cooperation, Paper by John Temple Lang, "Aims of enhanced international cooperation in competition cases", DAF/COMP/WP3(2014)7, 28 May 2014, 7.

monitoring and supervision of that jurisdiction, and third the development of a system for handling complaints against it.¹⁷⁴⁸

It is crucial in this system that the ‘right’ agency is selected as lead jurisdiction. It is suggested that to this end a forum or an international panel is established that would be in charge of deciding on the potential lead jurisdiction for a given case, taking into account a number of criteria. First, it should be determined which jurisdiction’s internal market represents the centre of gravity for the activities to be investigated (‘primary effects clause’). Secondly, it is important that the jurisdiction can effectively enforce competition law in a non-discriminatory manner, while disposing of sufficient resources and skills to do so. Finally, the jurisdiction must demonstrate, and must have a track record of demonstrating, that it is willing and has the experience to safeguard comity and other jurisdictions’ legitimate interests while investigating, handling and deciding on the case. All affected consumers and markets must be protected.¹⁷⁴⁹ In this mandatory system, the lead jurisdiction’s decision is binding on the other affected jurisdictions.¹⁷⁵⁰ BUDZINSKI, adding the vertical multilevel dimension to the lead jurisdiction concept, suggested introducing a referee authority, which would be tasked with allocating the lead jurisdiction on a case-by-case basis according to agreed-upon criteria, overseeing the impartiality of the assigned lead jurisdiction in its assessment, and providing conflict resolution when certain jurisdictions claim that their legitimate interests were overseen or disregarded by the lead jurisdiction. This referee authority could be established as an independent body within an international organization, or could take the form of an international forum or panel consisting of representatives of the participating competition policy regimes.¹⁷⁵¹ This solution would not provide supranational institutions with the power to materially decide cases, which, as established, currently is not realistic, but would still necessitate the conclusion of an international agreement on allocation criteria and monitoring and conflict resolution mechanisms. The OECD suggested that provisions to this end, for instance identifying the factors to take into account when deciding on the lead jurisdiction or the requirements which the designated authority should follow in enforcing its competition laws, could be included in a model cooperation agreement in the provisions on comity, which already allow a party to request the other party to investigate and remedy anticompetitive activities. Lead jurisdiction provisions could expand these concepts.¹⁷⁵²

Another difficulty regards the question whether the decision of the non-lead jurisdiction to follow the lead jurisdiction’s decision would have to constitute a challengeable decision. If this is the case, it would significantly detract from the efficiencies created.¹⁷⁵³ Would each non-lead jurisdiction remain accountable before its national courts for the final decision made, when it was not the one executing the comprehensive competition analysis of the case lying at the basis of it? Another issue is how a

¹⁷⁴⁸ OECD, Summary of discussion of the hearing on enhanced enforcement cooperation, DAF/COMP/WP3/M(2014)2/ANN2/FINAL, 7 November 2014, 6.

¹⁷⁴⁹ OECD, Summary of discussion of the hearing on enhanced enforcement cooperation, DAF/COMP/WP3/M(2014)2/ANN2/FINAL, 7 November 2014, 6.

¹⁷⁵⁰ OECD, Hearing on Enhanced Enforcement Cooperation, Paper by Prof. Olivier Budzinski, “Towards rationalizing multiple competition policy enforcement procedures: the role of lead jurisdiction concepts”, DAF/COMP/WP3(2014)6, 23 June 2014, 4.

¹⁷⁵¹ O. Budzinski, “Lead jurisdiction concepts – towards rationalizing multiple competition policy enforcement procedures”, Ilmenau Economics Discussion Papers, Vol. 19, No. 87, June 2014, 5-6.

¹⁷⁵² OECD, Report/Inventory on provisions contained in existing international co-operation agreements – Note by the secretariat, DAF/COMP/WP3(2014), 16 December 2014, 24.

¹⁷⁵³ “National Competition Laws, International Cooperation and Procedural Rights” in Cauffman, Caroline, Hao, Qian (eds), *Procedural Rights in Competition Law in the EU and China*, China-EU Law Series, Vol 3., Berlin, Heidelberg, Springer, 2016, 17.

potential fine would be distributed among the authorities involved. It is ill-suited that the lead agency would collect and retain a fine for the harm done in others states. According to TEMPLE LANG, a mandatory system for appointing a lead agency does not seem practicable and would introduce undesirable rigidity and scope for obstruction.¹⁷⁵⁴

Linked to the above criticism that a lead jurisdiction system would be overly complicated, the system might also be faced with the fact that too little agencies would be eligible to be a lead agency. As mentioned, an agency will need to adhere to certain standards with regard to independence and fairness, as well as resource and competence requirements to deal with major multijurisdictional cases, even if assistance of the other agencies is available. This might result in the same handful of big agencies leading all the cases. Regardless of such requirements, smaller agencies may struggle being selected as lead agency simply because a significant part of the relevant market activities will likely not fall within their domestic market. This is problematic because it may affect the acceptance of the overall system due to a (perceived) lack of participation. Moreover, a limited array of potential lead agencies may also complicate the enforcement of the principle of non-discrimination and may distort the focus on international welfare.¹⁷⁵⁵ This may lead to significant sovereignty, accountability, and subsidiarity concerns for smaller jurisdictions, which may find relying on one or more foreign jurisdictions to remedy international behaviour with domestic effect politically unpalatable.¹⁷⁵⁶ Finally there is the (albeit relatively minimal)¹⁷⁵⁷ problem of free-riding by certain jurisdictions with small but open economies, who may count on saving resources by downgrading the own national regime.¹⁷⁵⁸ The lack of eligible lead jurisdictions is a tangible risk, which according to BUDZINSKI makes this system ‘intrinsically aspirational’ as it stands.¹⁷⁵⁹

Fourth, as mentioned, a lead jurisdiction model is sometimes referred to as advanced comity. It therefore suffers from the same illnesses (see above, Part II, 2.2.4.3), the main ones relating to a lack of incentive and political will. In the majority of international cases the anti-competitive effects in different jurisdictions will not be homogenous. This in turn means that the affected jurisdictions will not all have the same interest in investigating the case, and the lead jurisdiction cannot provide a positive externality. The existing divergences in substantive and procedural relevant laws only aggravate this problem, as this system is likely to function only in the event of far-reaching convergence.¹⁷⁶⁰ Even authors advocating a lead jurisdiction model include a disclaimer on the political feasibility of it all.¹⁷⁶¹ The existence of political will to establish the necessary reforms is doubtful at best.¹⁷⁶²

¹⁷⁵⁴ OECD, Hearing on Enhanced Enforcement Cooperation, Paper by John Temple Lang, “Aims of enhanced international cooperation in competition cases”, DAF/COMP/WP3(2014)7, 28 May 2014, 7.

¹⁷⁵⁵ O. Budzinski, “Lead jurisdiction concepts – towards rationalizing multiple competition policy enforcement procedures”, Ilmenau Economics Discussion Papers, Vol. 19, No. 87, June 2014, 16.

¹⁷⁵⁶ J. Fingleton, “Competition Agencies and Global Markets: The Challenges Ahead” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 190.

¹⁷⁵⁷ This free-riding option has its obvious limitations because “[a]s soon as a jurisdiction experiences a non-negligible number of purely domestic antitrust cases (where it cannot rely on foreign agencies to protect competition and welfare), it is not rational to limit domestic competition policy activities to a free rider position.” O. Budzinski, “Lead jurisdiction concepts – towards rationalizing multiple competition policy enforcement procedures”, Ilmenau Economics Discussion Papers, Vol. 19, No. 87, June 2014, 16.

¹⁷⁵⁸ Ibid., 16.

¹⁷⁵⁹ OECD, Summary of discussion of the hearing on enhanced enforcement cooperation, DAF/COMP/WP3/M(2014)2/ANN2/FINAL, 7 November 2014, 7.

¹⁷⁶⁰ Ibid., 7.

¹⁷⁶¹ “Whether there is a political will to establish the necessary reforms may be doubtful, at least in the short run. However, this shall not stop academic thinking about possible solutions, their institutional shape, working mechanisms and economic performance.” O. Budzinski, “Lead

While in theory states might agree to an allocation mechanism, which would de facto constitute some sort of conflict-of-law provision, “*nothing achieved to date meets this description.*”¹⁷⁶³ Current agreements are testimony of the difficulties paired with imposing significant constraints on national regulatory power¹⁷⁶⁴ and the limits inherent to state-to-state bargains.¹⁷⁶⁵ There are no new incentives for potential lead jurisdictions, that are not altruistic actors, to take on the main burden for a case without privileging its own jurisdiction’s interests.¹⁷⁶⁶ GUZMAN rightly claimed that the problem of local bias and trade-induced distortions of national substantive policies cannot be solved via what is essentially a choice-of-law system.¹⁷⁶⁷ According to STEPHAN, the same issues and problems arise as in the case of substantive harmonization efforts, as “*the jurisdiction issue simply recasts the question of preferences for substantive competition rules.*”¹⁷⁶⁸ The main issue is then that there does not exist a ‘neutral’ template transcending national interests, and therefore there is reason to believe that such interests will affect the structure of any international bargain.¹⁷⁶⁹ ALBERS similarly foresaw that a lead jurisdiction model “*would [...] not seem to be a realistic next step, for much of the same reasons as those [...] concerning a World Competition Authority.*”¹⁷⁷⁰ There is simply no consensus on the substantive and procedural rules to be applied by the lead jurisdictions. A lead jurisdiction system implies both a willingness to accept material decisions by another jurisdiction as well as procedural decisions by a type of supranational body.¹⁷⁷¹ During the OECD discussion the delegation from the US even asked whether the potential benefits of the system outweighed the difficulties.¹⁷⁷²

The ‘interchangeability’ over borders of evidence should moreover not be taken for granted. Evidence valid in one jurisdiction is not necessarily or automatically usable as evidence in another

jurisdiction concepts – towards rationalizing multiple competition policy enforcement procedures”, Ilmenau Economics Discussion Papers, Vol. 19, No. 87, June 2014, 2.

¹⁷⁶² OECD, Hearing on enhanced enforcement cooperation, Paper by Prof. Olivier Budzinski, 23 June 2014, DAF/COMP/WP3(2014)6, “Towards rationalizing multiple competition policy enforcement procedures: the role of lead jurisdiction concepts”, 3.

¹⁷⁶³ Paul B. Stephan, Global governance, antitrust, and the limits of cooperation, *Cornell International law journal*, Vol. 38, 2005, 206.

¹⁷⁶⁴ Paul B. Stephan, Global governance, antitrust, and the limits of cooperation, *Cornell International law journal*, Vol. 38, 2005, 206.

¹⁷⁶⁵ M. Albers, “National Competition Laws, International Cooperation and Procedural Rights” paper for Cauffman, Caroline, Hao, Qian (eds), *Procedural Rights in Competition Law in the EU and China*, China-EU Law Series, Vol 3., Berlin, Heidelberg, Springer, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567001 (accessed July 2017), 16.

¹⁷⁶⁶ O. Budzinski, “Lead jurisdiction concepts – towards rationalizing multiple competition policy enforcement procedures”, Ilmenau Economics Discussion Papers, Vol. 19, No. 87, June 2014, 12.

¹⁷⁶⁷ Andrew T. Guzman, “International competition law”, in Andrew T. Guzman & Alan O. Sykes (eds), *Research Handbook in International Economic Law*, Cheltenham, Edward Elgar Publishing, 2007, 438.

¹⁷⁶⁸ P. Stephan, “Global governance, antitrust, and the limits of cooperation”, *Cornell International law journal*, Vol. 38, 2005, 209.

¹⁷⁶⁹ Ibid.

¹⁷⁷⁰ M. Albers, “National Competition Laws, International Cooperation and Procedural Rights” paper for Cauffman, Caroline, Hao, Qian (eds), *Procedural Rights in Competition Law in the EU and China*, China-EU Law Series, Vol 3., Berlin, Heidelberg, Springer, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567001 (accessed July 2017), 16.

¹⁷⁷¹ OECD, Hearing on Enhanced Enforcement Cooperation, Paper by Prof. Olivier Budzinski, “Towards rationalizing multiple competition policy enforcement procedures: the role of lead jurisdiction concepts”, DAF/COMP/WP3(2014)6, 23 June 2014, 5.

¹⁷⁷² OECD, Summary of discussion of the hearing on enhanced enforcement cooperation, DAF/COMP/WP3/M(2014)2/ANN2/FINAL, 7 November 2014, 8.

jurisdiction.¹⁷⁷³ Moreover, even if non-lead authorities are supposed to assist the lead jurisdiction, it is not said that they will do so. The lead jurisdiction concept does not offer a solution for cases where the lead authority cannot on its own gather all the necessary evidence, or implement a sanction or remedy for that matter.¹⁷⁷⁴ Finally, again as is the case with comity, a lead jurisdiction model, in particular a non-binding one, results in a significant amount of uncertainty for the legal subjects. As agencies have the continuous possibility to opt-in or opt-out, they are not obliged to offer, nor is it realistic to expect, a guarantee at an early stage that they will accept the result. Therefore companies cannot predict whether they will have to deal with only one agency.¹⁷⁷⁵ The system might struggle with transparency as well, and is likely to undergo difficulties where the competition impact and a potential sanction and remedy are different in all affected jurisdictions.¹⁷⁷⁶

4.1.4 The Commission on the leash: no autonomy to sign non-binding agreements (MoUs) on behalf of the EU

A) Context

It was established before that in the case of first generation agreements the formal, binding nature of the international instrument seems out of place (see above, Part II, 2.5.2.2, D). It is therefore relevant to inquire into the role potentially set aside for MoUs in international competition cooperation. The procedure of conclusion of bilateral competition cooperation agreements is quite time and resource intensive. The benefits of first generation dedicated competition agreements may therefore not outweigh the cost of concluding such agreements, which may explain why from 2009 onwards, the Commission began to conclude MoUs relating to competition cooperation with several partner countries, in particular with South-Korea in 2004, with Brazil in 2009, with Russia in 2011, with China in 2012, and with India in 2013, and plans to continue to do so in the future.¹⁷⁷⁷ The Commission indeed frequently concludes agreements that revolve around operational cooperation,

¹⁷⁷³ Ibid.

¹⁷⁷⁴ M. Albers, “National Competition Laws, International Cooperation and Procedural Rights” paper for Cauffman, Caroline, Hao, Qian (eds), *Procedural Rights in Competition Law in the EU and China*, China-EU Law Series, Vol 3., Berlin, Heidelberg, Springer, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567001 (accessed July 2017), 17.

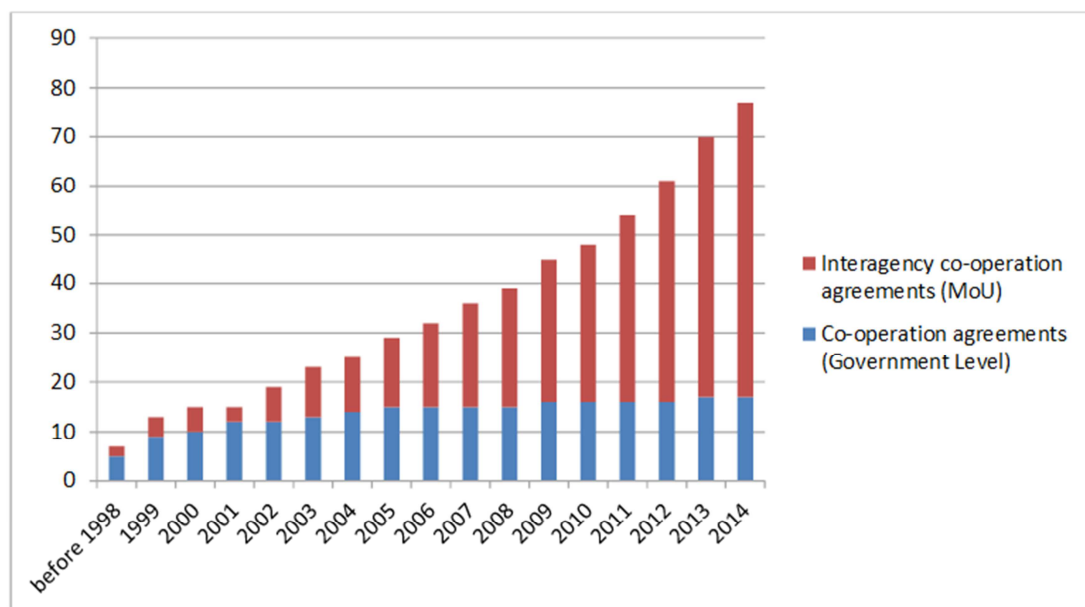
¹⁷⁷⁵ OECD, Hearing on Enhanced Enforcement Cooperation, Paper by John Temple Lang, “Aims of enhanced international cooperation in competition cases”, DAF/COMP/WP3(2014)7, 28 May 2014, 8.

¹⁷⁷⁶ M. Albers, “National Competition Laws, International Cooperation and Procedural Rights” paper for Cauffman, Caroline, Hao, Qian (eds), *Procedural Rights in Competition Law in the EU and China*, China-EU Law Series, Vol 3., Berlin, Heidelberg, Springer, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567001 (accessed July 2017), 17.

¹⁷⁷⁷ See Commission Management Plans: http://ec.europa.eu/atwork/synthesis/amp/index_en.htm (accessed November 2015). Memorandum of Understanding on Cooperation in the Area of Anti-Monopoly Law between on the one side the European Commission (Directorate-General for Competition) and on the other side the National Development and Reform Commission and the State Administration for Industry and Commerce of the People’s Republic of China, Brussels, 20 September 2012. (EU-China MoU); Memorandum of Understanding between the Directorate-General for Competition of the European Commission and the Competition Commission of India on Cooperation in the Field of Competition Laws, New Delhi, 21 November 2013. (EU-India MoU); Memorandum of Understanding on Cooperation between the Directorate-General for Competition of the European Commission and the Federal Antimonopoly Service of Russia, Brussels, 10 March 2011. (EU-Russia MoU); Memorandum of Understanding on Cooperation between the Directorate-General for Competition of the European Commission and the Council for Economic Defense, the Secretariat of Economic Law of the Ministry of Justice, and the Secretariat for Economic Monitoring of the Ministry of Finance of the government of the Federative Republic of Brazil, Brasília, 8 October 2009. (EU-Brazil MoU)

outside the standard treaty-making framework laid down in Article 218 TFEU.¹⁷⁷⁸ The Commission is not the only one to do so. According to the OECD, the number of competition authorities entering into agency-to-agency MoUs has steadily increased since 2000, as indicated by the table below. In April 2016 the OECD Secretariat had knowledge of at least 142 MoUs where one of the signatories was a competition authority of an OECD Member, Associate or Participant to the OECD Competition Committee, or the European Commission.¹⁷⁷⁹ The US as well has an extensive track record when it comes to concluding competition MoUs, including with Russia, Chile, and China.¹⁷⁸⁰

Graph 1. Development of co-operation agreements *



* FTAs or EPAs are not covered in the graph.

Figure 11. Source: OECD, Inventory of co-operation agreements, Note by the secretariat, DAF/COMP/WP3(2015)12/REV1, 20 November 2015, 32.

Strictly speaking, MoUs are non-binding agreements, sometimes labelled as ‘political agreements’, ‘gentlemen’s agreements’, ‘non-legally binding agreements’, ‘de facto agreements’, or ‘non-legal agreements’.¹⁷⁸¹ Such agreements are concluded between administrative authorities and their foreign peers to establish some form of cooperation, and do not bind the state itself on an international

¹⁷⁷⁸ “See, for instance, the *Framework Agreement between the European Commission (the ‘Commission’) and the Inter-American Development Bank (the ‘IDB’)* laying down the administrative and financial arrangements for their cooperation of 2011, [...]; *Framework Agreement between the European Commission (the ‘Commission’) and the International Monetary Fund (‘IMF’)* of 2009.” F. Coman-Kund, *European Union Agencies as global actors – a legal study of the European Aviation Safety Agency, Frontex, and Europol*, Maastricht, Production print Datawyse/Universitaire Pers Maastricht, 2015, 121.

¹⁷⁷⁹ OECD, *Inventory of International Co-operation MoUs between Competition Agencies*, List of Agency-to-Agency Memoranda of Understanding, available at <https://www.oecd.org/daf/competition/mou-inventory-list.pdf> (accessed July 2017).

¹⁷⁸⁰ OECD, *Discussion on International Co-operation*, Contribution of the United States, DAF/COMP/WP3/WD(2012)24, 12 June 2012, 8-9.

¹⁷⁸¹ A. Aust, *Modern Treaty Law and Practice*, 3rd ed., New York, Cambridge University Press, 2013, 28.

level, as the competence to do so is lacking with the signatories.¹⁷⁸² MoUs are placed more towards the soft law end of the continuum compared to first generation agreements, and are less formal. Generally such agreements are more flexible and easier to conclude or amend compared to government-to-government cooperation agreements, because their negotiation does not require the authorisation of legislative bodies or involvement of other governmental bodies, allowing them to be concluded in a timely manner based on current needs.¹⁷⁸³ The fact that the MoUs are non-binding does not make them any less effective than bilateral formal first generation agreements, as the provisions in the latter agreements were inherently unenforceable.¹⁷⁸⁴

The diversification in the legal instruments used to achieve bilateral enforcement cooperation in the field of competition and the confusion this diversity can cause is illustrated by the terminology used for such instruments. Explaining the terminology of treaty-names becomes increasingly complex, as the names of formal and informal instruments are changeable and lack consistency.¹⁷⁸⁵ One example of this changeability is the use of the term Memorandum of Understanding. Some agreements entitled MoU, are stricter than, or very similar to, agreements that are actually entitled international agreement. Some MoUs merely formalise existing working relationships, while others mark a new level of engagement between the parties.¹⁷⁸⁶ The Treaty Office Database contains some MoUs, while it does not include others, such as the ones on competition law. The classification is based on the content of the agreements, which means that some MoUs are included because they constitute legally binding agreements. The institutions negotiating such agreements are themselves accomplice to the confusion. For instance, a press release of the EEAS announced that former Vice President ALMUNIA signed a cooperation agreement with the Russian competition authority, while in fact it was not a dedicated competition cooperation agreement, but an MoU, which is, from a legal point of view, a different instrument.¹⁷⁸⁷

In the context of international competition cooperation MoUs are often labelled as representing a mere ‘tentative first step’ towards further cooperation. They are defined as ‘getting to know you’ best endeavours agreements.¹⁷⁸⁸ At the same time, however, the OECD confirms that most MoUs are modelled on intergovernmental cooperation agreements, with a similar structure, but with less detailed provisions. Most of the EU’s competition-related MoUs indeed go beyond ‘getting to know you’ provisions and have a content almost identical to that of the first generation agreements.¹⁷⁸⁹ The OECD distinguishes between three types of competition MoUs, where some contain all basic

¹⁷⁸² B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 76-77.

¹⁷⁸³ OECD, Inventory of co-operation agreements, Note by the secretariat, DAF/COMP/WP3(2015)12/REV1, 20 November 2015, 32.

¹⁷⁸⁴ OECD, Inventory of International Co-operation MoUs between Competition Agencies, List of Agency-to-Agency Memoranda of Understanding, available at <https://www.oecd.org/daf/competition/mou-inventory-list.pdf> (accessed July 2017).

¹⁷⁸⁵ A. Aust, *Modern Treaty Law and Practice*, 3rd ed, New York, Cambridge University Press, 2007, 22.

¹⁷⁸⁶ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 37.

¹⁷⁸⁷ European Commission, Press Release, “Vice President Almunia signs cooperation agreement with Russian competition authority”, IP/11/278, Brussels, 10 March 2011.

¹⁷⁸⁸ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 35; also see OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 37, where it is stated that MoUs between agencies or countries constitute nonbinding ‘best endeavours’ agreements.

¹⁷⁸⁹ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 35. On MoUs, also see V. Demedts, “International Competition law enforcement: different means, one goal?”, *Competition Law Review*, Vol. 8, No. 3, 2012, 242-243.

elements of comprehensive cooperation agreements, while others aim to establish a basic structure wherein dialogue between the two competition authorities can take place, but do not provide specific means of enforcement cooperation. Such MoUs may contain provisions on transparency and communication and/or technical cooperation. This could include conducting or participating in conferences, seminars, workshops or training courses, exchange of personnel or study trips, or providing assistance in advocacy activities.¹⁷⁹⁰ A third category equally includes the basic elements of cooperation agreements, but in a simplified or less elaborate form.¹⁷⁹¹ Some important differences can nevertheless be found between the 1991 EU-US Agreement and the EU's more recent MoUs, in order to avoid similar objections as those voiced by France in the past (see above, Part I, 2.4.2 and Part II, 2.3.1). First, it is DG COMP that is signatory to the agreements. Second, mention is no longer made of 'the Parties' to the agreement, but rather 'the Sides'. There is generally no provision regarding the termination of the memorandum, with the exception, however, of the EU-China and EU-India memoranda.¹⁷⁹² Finally, the MoUs contain provisions explicitly stating that "[t]he provisions of the MoU are not designated to create legal rights or obligations under international law",¹⁷⁹³ and sometimes there is an additional provision stating that "[t]he Sides will apply the provisions of this Memorandum of Understanding on a voluntary basis".¹⁷⁹⁴ There can therefore be no confusion as to the non-legally binding nature.¹⁷⁹⁵

As mentioned, the apparent 'shift' in the Commission's preferences from first generation agreements to MoUs is largely motivated by the lighter procedural burden to conclude the latter agreements. A recent judgement by the CJEU has however indicated the limits to this practice in addition to the aforementioned *France v Commission* cases (see above, Part I, 2.4.2 and Part II, 2.3.1).¹⁷⁹⁶ It would run against Article 218 TFEU that the Commission, pursuant to its prerogative of representing the

¹⁷⁹⁰ OECD, Inventory of International Co-operation MoUs between Competition Agencies, List of Agency-to-Agency Memoranda of Understanding, available at <https://www.oecd.org/daf/competition/mou-inventory-list.pdf> (accessed July 2017)

¹⁷⁹¹ OECD, Inventory of co-operation agreements, Note by the secretariat, DAF/COMP/WP3(2015)12/REV1, 20 November 2015, 32.

¹⁷⁹² Article 5.5 Memorandum of Understanding on Cooperation in the Area of Anti-Monopoly Law between on the one side the European Commission (Directorate-General for Competition) and on the other side the National Development and Reform Commission and the State Administration for Industry and Commerce of the People's Republic of China, Brussels, 20 September 2012 (EU-China MoU); Article VIII Memorandum of Understanding between the Directorate-General for Competition of the European Commission and the Competition Commission of India on Cooperation in the Field of Competition Laws, New Delhi, 21 November 2013 (EU-India MoU).

¹⁷⁹³ Article VIII Memorandum of Understanding on Cooperation between the Directorate-General for Competition of the European Commission and the Council for Economic Defense, the Secretariat of Economic Law of the Ministry of Justice, and the Secretariat for Economic Monitoring of the Ministry of Finance of the government of the Federative Republic of Brazil, Brasília, 8 October 2009 (EU-Brazil MoU), Article 5.3 EU-China MoU, Article VIII EU-India MoU, Article VIII Memorandum of Understanding on Cooperation between the Directorate-General for Competition of the European Commission and the Federal Antimonopoly Service of Russia, Brussels, 10 March 2011 (EU-Russia MoU).

¹⁷⁹⁴ Article 5.2 EU-China MoU, Article VIII EU-India MoU.

¹⁷⁹⁵ MoUs may also constitute second generation agreements, as is the case for the Cooperation Arrangement between the New Zealand Commerce Commission and the Australian Competition and Consumer Commission in relation to the Provision of Compulsory-acquired Information and Investigative Assistance, Sidney, 19 April 2013 and the Cooperation Arrangement between the Fair Trade Commission of Japan and the Australian Competition and Consumer Commission, Sydney, 29 April 2015. Both agreements give effect to the domestic gateway provisions (Section 155AAA of the Competition and Consumer Act 2010 for Australia and Article 43-2 of the Antimonopoly Act for Japan). (OECD, Inventory of co-operation agreements, Note by the secretariat, DAF/COMP/WP3(2015)12/REV1, 20 November 2015, 33.) This implies that the authorities may only exchange confidential information within the limitations of the domestic legal frameworks.

¹⁷⁹⁶ Judgment of 28 July 2016, *Council v Commission*, C-660/13, EU:C:2016:616.

Union externally, would sign agreements on behalf of the Union without having received the explicit authorization of the Council. However, would this situation change if the agreement in question is non-binding? There has been some discussion between the Council and the Commission on whether the latter may conclude nonbinding political agreements such as MoUs without prior authorisation of the former. In practice, the Council has *retroactively* authorised the Commission, but no longer wishes to subscribe to this practice. By bringing the Commission before the Court, the Council took action against a perceived increased tendency of the Commission to sign non-binding instruments containing EU policy commitments.¹⁷⁹⁷ The question was put to the Court of Justice in Case C-660/13, where the Council for the first time challenged this Commission practice before the Court.¹⁷⁹⁸ The Council *in casu* asked for the annulment of the Commission decision of 3 October 2013 on the signature of an Addendum to the Memorandum of Understanding of 27 February 2006 on a Swiss financial contribution to the new Member States.¹⁷⁹⁹ If the length of a procedure is an indication of the complexity of the case, the Court *in casu* was faced with some very difficult questions: the proceedings were initiated in December 2013, but the Court only issued its judgment on 28 July 2016.

This case is exemplary for the broader debate on the uncertain legal environment in which non-treaty agreements are concluded.¹⁸⁰⁰ In several jurisdictions a distinction is made between important agreements requiring legislative approval on the one hand and less important agreements which may be ratified by the executive on the other hand.¹⁸⁰¹ This is even formalised in Article 101 of the Euratom Treaty.¹⁸⁰² In the EU, some instruments for international cooperation are explicitly provided for in the Treaties, whereas others are not. The latter instruments, such as opinions, recommendations, declarations, reports, MoUs, or working arrangements, are often used by the Commission for instance in the exercise of its external relations tasks. According to COMAN-KUND, the broad and vague phrasing of some of the treaty provisions suggests that there are other means for taking international action and therefore seems to include the possibility for such instruments. Despite widespread use (by both EU and non-EU states as well as the EU itself), so-called ‘administrative agreements’ are surrounded by legal ambiguity.¹⁸⁰³

¹⁷⁹⁷ Opinion of Advocate General Sharpston in *Council v Commission*, C-660/13, EU:C:2015:787, paragraph 79.

¹⁷⁹⁸ Judgment of 28 July 2016, *Council v Commission*, C-660/13, EU:C:2016:616. Disclaimer: this section draws from the following case-note: V. Demedts & M. Chamon, “The Commission back on the leash: no autonomy to sign non-binding agreements on behalf of the EU: Council v Commission”, *Common Market Law Review*, Vol. 54, No. 1, 2017, 245-262.

¹⁷⁹⁹ Commission Decision on the signature of the Addendum to the Memorandum of Understanding on a Swiss financial contribution, C(2013) 6355 final, 3 October 2013.

¹⁸⁰⁰ “Whereas it is undisputed that the international agreements concluded by the Union according to Article 218 TFEU result in legally binding effects, there is ambiguity concerning the legal nature and effects of the other international cooperation instruments used in the EU’s external relations practice (not mentioned by the Treaties). In particular, one may wonder about the legal nature and effects of the memoranda of understanding concluded by the EU with third countries [...]” (F. Coman-Kund, *European Union Agencies as global actors – a legal study of the European Aviation Safety Agency, Frontex, and Europol*, Maastricht, Production print Datawyse/Universitaire Pers Maastricht, 2015, 103.)

¹⁸⁰¹ F. Morrison, “Executive Agreements”, in *Max Planck Encyclopaedia of Public International Law*, available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1403> (accessed 5 August 2016).

¹⁸⁰² Which states: “The Community may, within the limits of its competence, enter into obligations by means of the conclusion of agreements or conventions with a third country, an international organisation or a national of a third country. Such agreements or conventions shall be negotiated by the Commission in accordance with directives issued by the Council and shall be concluded by the Commission with the approval of the Council acting by means of a qualified majority vote. Agreements or conventions the implementation of which does not require action by the Council and can be effected within the limits of the appropriate budget shall, however, be negotiated and concluded by the Commission, provided that it keeps the Council informed thereof.”

¹⁸⁰³ F. Coman-Kund, *European Union Agencies as global actors – a legal study of the European Aviation Safety Agency, Frontex, and Europol*, 2015, Universitaire Pers Maastricht, 102-103, 109, 147, 157.

More specifically for the EU, the case *Council v Commission* raised important issues related to the institutional balance in the EU's external relations and the extent of the Commission's powers of representation. The earlier *France v. Commission* cases already provided clarification on the situation in which the Commission respectively concluded a binding international agreement on the EU's behalf and a non-binding international agreement committing only itself.¹⁸⁰⁴ As mentioned, competition MoUs are generally concluded in name of the agencies themselves, in contrast to first and second generation agreements. Nevertheless, the case under discussion further completes the picture by embarking on the issue of non-binding agreements concluded by the Commission on behalf of the Union. Both the 2012 Common Approach on EU Agencies and the Commission's Vademecum on External Relations voiced concerns about the incapacity of EU agencies more generally to commit the Union to international obligations.¹⁸⁰⁵ The Common Approach calls for a clear strategy to be adopted in this regard in order to avoid issues both from an international law perspective and the EU's institutional balance of powers post-Lisbon.¹⁸⁰⁶

B) *Facts and arguments of the parties*

While Switzerland is not a member of the EU, it has access to the internal market based on a series of bilateral agreements with the EU.¹⁸⁰⁷ Following the 2004 EU enlargement, Switzerland agreed to make a financial contribution to reduce economic and social disparities within the enlarged Union. To this effect it concluded an MoU with the EU in 2006,¹⁸⁰⁸ which the parties intended to be non-binding.¹⁸⁰⁹ Through the MoU the Swiss Confederation committed itself to concluding a series of bilateral agreements with the EU Member States that joined the Union in 2004, whereby those agreements “*must be in conformity with the guidelines laid down in the Memorandum.*”¹⁸¹⁰ In their ‘hybrid’ conclusions, the Council and the representatives of the Member States meeting in Council further agreed that the MoU would be signed, on the part of the EU, both by the Council Presidency and by the Commission.¹⁸¹¹ A first addendum to the MoU, to include Bulgaria and Romania in the financial mechanism, was concluded in 2008 and signed by the same parties as the original MoU.¹⁸¹² At the end of 2012 the Commission was again mandated by the Council, and the Member States meeting

¹⁸⁰⁴ Judgment in *France v Commission*, C-327/91, EU:C:1994:305 (France v Commission I); Judgment in *France v Commission*, C-233/02, EU:C:2004:173 (France v Commission II).

¹⁸⁰⁵ F. Coman-Kund, *European Union Agencies as global actors – a legal study of the European Aviation Safety Agency, Frontex, and Europol*, Maastricht, Production print Datawyse/Universitaire Pers Maastricht, 2015, 158-159.

¹⁸⁰⁶ A. Ott, E. Vos and F. Coman-Kund, “EU agencies and their international mandate: A new category of global actors?”, *CLEER Working Papers* 2013/7, 9.

¹⁸⁰⁷ On these agreements, see M. Maresceau, “EU-Switzerland: Quo Vadis?”, *Georgia Journal of International and Comparative Law*, Vol. 39, No. 3, 2011, 729-737.

¹⁸⁰⁸ For the text of the MoU, see Conclusions of the Council of the European Union and of the Representatives of the Governments of the Member States meeting within the Council on a financial contribution by the Swiss Confederation, Doc. 6283/06, 14 February 2006.

¹⁸⁰⁹ Although it is not entirely clear from the MoU itself. See Opinion of Advocate General Sharpston in *Council v Commission*, C-660/13, EU:C:2015:787, paragraph 32.

¹⁸¹⁰ See Conclusions of the Council of the European Union and of the Representatives of the Governments of the Member States meeting within the Council on a financial contribution by the Swiss Confederation, 14 February 2006, Doc. 6283/06, 9.

¹⁸¹¹ *Ibid.*, 3.

¹⁸¹² See Conclusions of the Council of the European Union and of the Representatives of the Governments of the Member States meeting within the Council on an Addendum to the Memorandum of Understanding between the President of the Council of the European Union and the Swiss Federal Council of 27 February 2006, Doc. 8681/08, 5 May 2008.

within the Council, to engage in the necessary negotiations on the adaptation of the Swiss financial contribution in light of the imminent EU accession of Croatia. However, unlike the previous addendum, the 2013 addendum was signed by the Commission alone, on behalf of the EU.

According to the Commission, the Council's 2012 conclusions constituted a political decision in the sense of Article 16 TEU, allowing it not only to negotiate but also to conclude the addendum with Switzerland. As a result, the Commission did not request the Council's (or the Member States') prior approval,¹⁸¹³ although it did keep the EFTA Working Party of the Council informed of the result of the negotiations. The legal basis cited by the Commission's decision was Article 17 TEU, which gives the Commission a general competence to represent the EU internationally and to perform coordinating, executive and management tasks.¹⁸¹⁴ The Commission considered that the contested signature was no more than an act of external representation according to Article 17(1) TEU on a political position previously fixed by the Council and therefore did not require authorisation by the Council. It relied in this on *Commission v Sweden* where the Court found that it is not necessary for a common position to take a specific form in order for it to exist.¹⁸¹⁵

The Council in turn claimed that the Commission's action was illegal as it violated the principle of distribution of powers contained in Article 13(2) TEU and, consequently, the principle of institutional balance. Second, according to the Council, the Commission's behaviour leading to the adoption of the contested decision as well as the signing of the 2013 Addendum violated the principle of mutual sincere cooperation. That this case was purely about procedure and not about the substance of the addendum was evidenced by the fact that the Council had requested the Court to order that the effects of the decision be maintained until it is replaced.¹⁸¹⁶ The Council based its arguments on the 2004 *France v. Commission* case (*France v. Commission II*), dealing with the non-binding Guidelines on Regulatory Cooperation and Transparency concluded with the US.¹⁸¹⁷ In that case the Court ruled that "[d]etermining the conditions under which such a measure may be adopted requires that the division of powers and the institutional balance established by the Treaty in the field [...] be duly taken into account"¹⁸¹⁸, which is exactly what the Council reproached the Commission of not having done in the case under scrutiny. In *France v. Commission II*, the Court found the Guidelines non-binding, but immediately added that this did not make the Commission competent to conclude them. While the Court did exclude the application of what is currently article 218 TFEU, it did not further establish the applicable procedure and the respective power(s) of the institutions.¹⁸¹⁹ Instead, it simply stated that in absence of any explicit provision on the issue in the Treaties, the institutions are required to respect the general division of powers and the institutional balance established by the Treaty.

¹⁸¹³ Opinion of Advocate General Sharpston in *Council v Commission*, C-660-13, EU:C:2015:787, paragraph. 40-42. Since the Commission was of the opinion that the 2012 conclusions were Council conclusions (hybrid acts not being possible), it did not require the consent of the Member States in any case.

¹⁸¹⁴ Opinion of Advocate General Sharpston in *Council v Commission*, C-660-13, C-660/13, EU:C:2015:787, paragraph 41.

¹⁸¹⁵ Judgment of 20 April 2010, *European Commission v Kingdom of Sweden*, C-246/07, EU:C:2010:203, paragraph 77.

¹⁸¹⁶ Opinion of Advocate General Sharpston in *Council v Commission*, C-660/13, EU:C:2015:787, paragraphs 5, 53.

¹⁸¹⁷ Judgment of 23 March 2004, *French Republic v Commission of the European Communities*, C-233/02, EU:C:2004:173, paragraphs 38-46.

¹⁸¹⁸ Ibid., paragraph 40.

¹⁸¹⁹ Ibid., paragraph 45.

According to the Council the Commission may not take it upon itself to decide on the policy of the Union, which is a power of the Council pursuant to Article 16 TEU.¹⁸²⁰ While the Commission generally represents the Union's position, it cannot determine that position's content. It also cannot unilaterally disregard the role of Member States, in breach of the principle of conferral of powers of Article 4(1) TEU or intentionally act in a manner which renders efforts of the Council to correct the situation created by the Commission ineffectual.¹⁸²¹ The signing of an international agreement implies the Union's acceptance of the agreement's content, which cannot be predicted *ex ante* and therefore cannot be considered as being covered by an 'established position'.¹⁸²²

C) Reasoning of the Court

The Court did not address the issue of admissibility, but immediately addressed the substance of the case.¹⁸²³ The Court did not enter into the existence of the EU's competence as such either. In this regard, the Commission had argued that the contested decision, which mentioned Article 17(1) TEU as its legal basis, did not need to refer to a material legal basis given that it was non-binding. The repercussions of such an argument are clear: the purpose of identifying the legal basis of an EU action precisely is to allow the EU to act in accordance with the principle of conferral. Arguing that a legal basis is not required, because the act is non-binding, amounts to arguing that no EU competence needs to be shown which may further be translated conveniently into concluding that the EU may act to the exclusion of the Member States. As a matter of principle, such a reasoning should be rejected and the Court might have dealt with it similarly as in *France v. Commission II* in which it noted that the non-binding nature of the Guidelines did not confer a competence on the Commission to adopt them, but required that the division of powers and the institutional balance established by the Treaty should be taken into account.¹⁸²⁴ Evidently the same approach should be followed when the competence of the Union (instead of that of an institution) is at issue.

With regard to the first plea, the Court began by explaining the principle of conferral, further clarifying that article 13(2) TEU constitutes a reflection of the principle of institutional balance.¹⁸²⁵ The Council had put forward that Article 218 TFEU reflects the general distribution of powers

¹⁸²⁰ Council of the European Union, Contribution of the legal service Subject: Procedure to be followed for the conclusion by the EU of Memoranda of Understanding, Joint Statements and other texts containing policy commitments, with third countries and international organisation, 5707/13, 1 February 2013.

¹⁸²¹ T. Ramopoulos & J. Wouters, "Charting the legal landscape of EU external relations post-Lisbon", Leuven Centre for Global Governance Studies, Working Paper No. 156, March 2015, 14-15.

¹⁸²² Opinion of Advocate General Sharpston in *Council v Commission*, C-660/13, EU:C:2015:787, paragraph 89-91.

¹⁸²³ As it did in *France v Commission*, where it dismissed the case on its merits finding that it did not have to rule on whether the Commission's decision to conclude a non-binding agreement with its US counterpart could be the subject of an action for annulment. See Judgment of 23 March 2004, *French Republic v Commission of the European Communities*, C-233/02, EU:C:2004:173, paragraph 26. It is not the first time in recent external relations litigation that the Court has avoided the question of characterizing the contested act and elaborating on the admissibility of an action (see for instance Judgment of 6 October 2015, *Council of the European Union v European Commission*, C-73/14, EU:C:2015:663). While the Commission did not raise the issue of admissibility under Article 263 TFEU, which *inter alia* requires the contested act to produce legal effects, the Advocate General did enter into the matter of admissibility of the decision to sign a non-binding agreement, but this falls outside the scope of this research. See Opinion of Advocate General Sharpston in *Council v Commission*, C-660/13, EU:C:2015:787, paragraph 61-71. For an analysis of the admissibility issue in this case, see V. Demedts & M. Chamon, "The Commission back on the leash: no autonomy to sign non-binding agreements on behalf of the EU: Council v Commission", 2017, *Common Market Law Review*, Vol. 54, No. 1, 255-256.

¹⁸²⁴ Judgment of 23 March 2004, *French Republic v Commission of the European Communities*, C-233/02, EU:C:2004:173, paragraph 40.

¹⁸²⁵ *Ibid.*, paragraph 32.

under Articles 16 and 17 TEU, conferring on it the power to define Union policy in external relations and thereby implying that the Council authorises negotiations *and* approves the international political commitments of the Union. The inapplicability *in casu* of Article 218 TFEU (since the addendum was not binding)¹⁸²⁶ would therefore not preclude involvement of the Council. Regrettably, the Court, however, was silent on the application of Article 218 TFEU as the reflection of the institutional balance in external relations. It did not express itself on whether the procedure set out in Article 218 TFEU should be applied *mutatis mutandis* when non-binding agreements are concluded on behalf of the EU and thereby also left doubts on for instance the role of the European Parliament in all this, which would benefit from an interpretation of the Court's ruling as confirming Article 218 TFEU as the 'default' provision for the EU's external relations or as the *lex generalis* in this area. The Court did not explicitly apply an institutional balance test, but seems to have effectively followed up on the suggestion of the Council. While the Court did not refer to Article 218 TFEU itself, it did apply part of the institutional balance enshrined in that Article: Council mandates, Commission negotiates and Council approves (see below). The role of the European Parliament is relevant as well as obscure in the case of competition MoUs, even if the latter only commit the Commission on a political level. It cannot be denied that their content is quite similar to that of full-fledged first generation agreements. The Framework Agreement on relations between the European Parliament and the European Commission regulates the relationship between the two institutions with regard to formal international agreements that require approval by the Council, but remains quiet concerning agreements where the Commission binds only itself, such as MoUs.¹⁸²⁷ It is examined on a case-by-case level whether informing the European Parliament would be appropriate.

At the centre of the first plea of the Council was the question of what constitutes policy making. In this regard, the AG noted that Union policy is adopted at the level of the European Council and Council, pursuant to Articles 15 and 16 TEU. Their prior intervention is needed for the Commission to know what Union policy to represent externally pursuant to Article 17 TEU. It is the Council who should decide whether the Union should initiate negotiations with a third State to reach agreement on a matter (related to) an area for which the Union is competent and to decide on the interests to be pursued.¹⁸²⁸ The Commission put forward that the contested decision did not diverge from the Union's position on the financial contribution for Croatia set out in the 2012 Conclusions and that there had been no margin of discretion on the matter for the Commission during the negotiations. The content of the final agreement therefore corresponded to the negotiating mandate. The AG countered that argument by finding that the Council is charged to verify the content of an agreement, the form of external action used, respect for relevant constraints, and to monitor the need for the Union to become a party to that agreement. It must decide whether the commitments made by the parties to an agreement contribute to the objectives pursued, whether they remain relevant, whether the Union is willing to accept it and whether it agrees to the consequences international and EU law may attach to the external action.¹⁸²⁹ The Court equally found that the

¹⁸²⁶ Neither of these elements were contested by the parties.

¹⁸²⁷ Framework Agreement on Relations between the European Parliament and the European Commission, *OJ L* 304/47, 20 November 2010, points 23-25.

¹⁸²⁸ Opinion of Advocate General Sharpston in *Council v Commission*, C-660/13, EU:C:2015:787, paragraph 104-105, 108-110. Such policy-making then also includes, as was the case in the situation at hand, "*the decision that an objective for which the Union is competent can be pursued by obtaining a commitment (whether or not binding) from a third State to pay a financial contribution to a new Member State pursuant to a future bilateral agreement between those two parties (assuming no such decision has been taken earlier) and thus by participating in external action, in the form of negotiations and possibly the subsequent conclusion of an instrument to obtain that commitment.*" (Opinion of Advocate General Sharpston in *Council v Commission*, C-660/13, EU:C:2015:787, paragraph 111.)

¹⁸²⁹ Opinion of Advocate General Sharpston in *Council v Commission*, C-660/13, EU:C:2015:787, paragraph 44, 94-95, 113-116.

decision to sign (even a non-binding) agreement cannot come under Article 17 TEU since it requires an assessment of the actual content of the agreement. As a result, it constitutes the making of Union policy and therefore falls under Article 16 TFEU. The Court does not find its conclusion affected by the fact that the content of the Addendum (as negotiated) corresponded to the Council's original negotiating mandate. The negotiation and the signing of an agreement indeed entail an assessment of the Union's interest on two different moments in time: even if the content of the Addendum corresponded to the negotiating mandate, the Union's interests may have changed in the meantime, and a second assessment is required. It should be checked whether the agreement still reflects the Union's interests, something that cannot be determined in advance.¹⁸³⁰

From this, the Court concluded that “*the Commission cannot be regarded as having the right, by virtue of its power of external representation under Article 17(1) TEU, to sign a non-binding agreement resulting from negotiations conducted with a third country.*”¹⁸³¹ The Court added that the 2012 Conclusions did not authorise the Commission to sign the addendum on behalf of the EU.¹⁸³² This may suggest that the Court would accept such a power on the part of the Commission if it were delegated to it *beforehand* by the Council. The procedure set out in Article 218 TFEU appears rather unwieldy for the purpose of concluding technical and/or non-binding agreements of limited importance. One option to allow for effective external action is to rely on a *lex specialis* prescribing a ‘light’ procedure. A suggestion to this end may then indeed be read in the Court's discussion of the 2012 Council Conclusions since it noted, in a rather clear way in different language versions of the decision, that the Conclusions did not contain an authorisation to sign the addendum and that the Commission had not put forward any evidence showing the Council had intended to do so in its Conclusions.¹⁸³³ It might therefore be inferred from the judgment that the Council could have granted such a power to the Commission in its Conclusions. While Article 218 (5) TFEU evidently allows the Council to authorize the signing of an agreement, it presupposes that the authorization follows the negotiations instead of preceding it. This also seems to be the understanding of the Council Legal Service.¹⁸³⁴ In the US, executive agreements may be solely presidential (without Congress' involvement) but they may also be concluded by the President acting pursuant to a congressional delegation.¹⁸³⁵ By analogy then, the EU legal order does not recognize purely autonomous Commission agreements (binding on the EU) but it might accept autonomous Commission agreements adopted pursuant to a legislative mandate.¹⁸³⁶ It

¹⁸³⁰ Judgment of 28 July 2016, *Council v Commission*, C-660/13, EU:C:2016:616, paragraph 40-43, 47.

¹⁸³¹ *Ibid.*, paragraph 38.

¹⁸³² *Ibid.*, paragraph 37.

¹⁸³³ *Ibid.*, paragraph 37.

¹⁸³⁴ See Council of the European Union, Contribution of the legal service Subject: Procedure to be followed for the conclusion by the EU of Memoranda of Understanding, Joint Statements and other texts containing policy commitments, with third countries and international organisation, 5707/13, 1 February 2013, paragraph 12.

¹⁸³⁵ See J. Arnold, “Executive Agreements in the Aftermath of *Weinberger v. Rossi*: Undermining the Constitutional Treaty-Making Power”, *Fordham International Law Journal*, Vol. 6, No. 3, 1982, 642.

¹⁸³⁶ In this context, it is worth mentioning that there are some occasions on which the Council has, in a single decision, authorised a Member State and/or the Commission to both negotiate and conclude an agreement on behalf of the Union (see for instance Council Decision 1999/97/EC of 31 December 1998 on the position to be taken by the Community regarding an agreement concerning the monetary relations with the Republic of San Marino, *OJ L* 30, 4.2.1999, resulting in the Monetary Agreement between the Italian Republic, on behalf of the European Community, and the Republic of San Marino, and Council Decision 2009/904/EC of 26 November 2009 on the position to be taken by the European Community regarding the renegotiation of the Monetary Agreement with the Republic of San Marino, *OJ L* 322, 9.12.2009). One can wonder whether these techniques could be seen as an application of Article 216 TFEU, which allows the Union to enter into international agreements when this is provided for in a legally binding Union act (gratitude goes out to professor OTT for pointing out the general potential of Article 216 TFEU in this respect as a *lex specialis* to depart from the *lex generalis* contained in Article 218 TFEU).

should, finally, be stressed that the Court did introduce ambiguity in its ruling by suggesting the possibility of an *ex ante* Council delegation as the latter would appear inconsistent with the central reasoning of the judgment, namely that an assessment of the Union's interests should take place both at the start (negotiating mandate) and at the end (conclusion of the agreement) of international negotiations. The Court deemed it unnecessary to assess the second plea relating to breach of the principle of sincere cooperation.¹⁸³⁷

The obvious risk following this judgment is that it may stifle the efficiency and effectiveness of the EU's external action. Indeed, a consequence of the Court's rather strict reading of the treaties in the *France v Commission* cases and the *Council v Commission* case is that any internationally agreement committing the Union, no matter how minor or technical, should be concluded under the heavy procedure of Article 218 TFEU. Even if this is the logical solution in the light of the formal Treaty provisions, it nevertheless raises important problems such as significant delays in the negotiation process and political issues in the event where on the other side, the authority concluding the agreement is a state agency fully competent for the matter within the scope of the agreement. According to COMAN-KUND it is therefore inevitable that the category of 'technical-administrative' agreements is acknowledged in the EU, since international practice *de facto* compels the EU to use such instruments in establishing cooperation. It is, however, essential that also in such cases, coordination with the Council and the Member States takes place.¹⁸³⁸ The Council may still tolerate autonomous Commission action but that it now also has a big stick in reserve to exclude such Commission action in areas deemed too sensitive. Time will tell whether the efficiency of EU external action will suffer or whether the institutions will find a workable *modus vivendi*.¹⁸³⁹

It may be recalled here that in *France v. Commission I* the Court rejected the idea that the Commission could conclude *binding* administrative agreements on behalf of the EU. In *France v. Commission II* the Court found that the Guidelines concluded between the Commission and US authorities were non-binding and that therefore Article 218 TFEU did not apply. It added however, that this did not mean that the institutional balance in the Common Commercial Policy could be disregarded. Still, since the Guidelines were embedded in the EU-US policy (as defined by the Council in the Transatlantic Economic Partnership and the Action Plan), the Court did not find a violation of the institutional balance. In the present case the Commission had also entered into a non-binding agreement and this, differently from *France v. Commission II*, clearly on behalf of the Union.

The brevity of the Court's decision may have resulted in an intelligible judgment, but it also means that certain issues which merited the Court's attention were (conveniently) glanced over. The Court's decision did not provide the level of guidance it could have since the Court *inter alia* refused to explicitly recognize that the institutional balance as laid down in Article 218 TFEU reflects the inter-institutional relations in the field of external relations and should therefore be applied by analogy to any situation not expressly covered by another Treaty provision. This raises the question of how the Court's decision affects the existing institutional practice in the EU's external relations. The Council

¹⁸³⁷ Judgment of 28 July 2016, *Council v Commission*, C-660/13, EU:C:2016:616, paragraph 48.

¹⁸³⁸ F. Coman-Kund, *European Union Agencies as global actors – a legal study of the European Aviation Safety Agency, Frontex, and Europol*, Maastricht, Production print Datawyse/Universitaire Pers Maastricht, 2015, 160-164.

¹⁸³⁹ It should be noted that with regard to the non-legally binding letters of intent with Mexico in the field of industry and entrepreneurship, the responsible Commissioner was authorized to sign on behalf of the Union as a whole, with his counterparts signing on behalf of Mexico. P-J Kuijper, J. Wouters, F. Hoffmeister, G. De Baere, T. Ramopoulos, *The law of EU external relations – cases, materials, and commentary on the EU as an international legal actor*, Oxford, Oxford University Press, 2013, 97.

brought proceedings as a test case in light of what it qualified as an increased Commission tendency to sign MoU's on behalf of the EU without Council approval.¹⁸⁴⁰ The Court's decision will now have put a halt to this practice but it does not provide adequate guidance in relation to the Commission's practice, for instance in the field of competition law, of concluding MoU's on its own behalf in line with *France v. Commission II*.¹⁸⁴¹ This case leaves open the question to what extent the institutions might have recourse to the technique of legislative delegation in order to safeguard the effectiveness of EU external action. The rather heavy procedure of Article 218 TFEU was drafted with proper international agreements in mind but it is unsuited for the conclusion of mere technical agreements, which do not require the same level of political investment. As cooperation evolves, the Commission might feel the need to conclude MoUs on behalf of the Union rather than merely itself. Whether any type of delegation would be possible in this situation as to avoid the hassle of an Article 218 TFEU procedure remains unsolved.

4.2 Cooperation in other policy fields

TIMBERG asked whether there were particularities regarding the nature of restrictive business practices that render them more difficult to manage internationally compared to tariff and other trade barriers, monetary and exchange restrictions, and impediments to economic development. Such other fields are technical and nationally sensitive as well, but are subject to operational international organs for their control, in contrast to competition policy.¹⁸⁴² SCHAUB equally noticed the advances made in international cooperation in fields such as customs, securities, or the war on drugs where discrepancies between rules did not seem to have precluded effective cooperation.¹⁸⁴³ Is competition law truly special? Is cooperation in the field of competition law entirely different than other areas of law, and does it merit special treatment? Are there particular problems or issues that only arise in competition law?¹⁸⁴⁴ It is remarkable how the reluctance to exchange confidential information in the field of competition law contrasts with the extent of cooperation in other areas of law.¹⁸⁴⁵

The 1996 Laudati-Report studied confidential information exchange agreements between the US and Member States of the EU in the areas of securities, criminal, tax and customs, in preparation for possible negotiations between the EU and the US on a second generation agreement. The report stated that generally it is the type of assistance that is needed in each area that determines the content of the agreement whereby a distinction can be made between the exchange of background information, or the exchange of evidence for court proceedings. It indicated though that the enabling legislation in areas such as tax, securities and customs foresaw less powerful tools and was vastly simpler than the US IAEAA. It mentioned as an explanation, based on statements of Antitrust Division officials, a greater level of control from Congress in this area in response to concerns

¹⁸⁴⁰ See Council of the European Union, Contribution of the legal service Subject: Procedure to be followed for the conclusion by the EU of Memoranda of Understanding, Joint Statements and other texts containing policy commitments, with third countries and international organisation, 5707/13, 1 February 2013, paragraph 1.

¹⁸⁴¹ See <http://ec.europa.eu/competition/international/bilateral/> (accessed 16 August 2016).

¹⁸⁴² S. Timberg, "Restrictive business practices as an appropriate subject for united nations action", *Antitrust Bulletin*, Vol. 1, 1955-1956, 415-416.

¹⁸⁴³ A. Schaub, "International Co-operation in Antitrust matters: making the point in the wake of the Boeing/MDD proceedings", *Competition Policy Newsletter*, No. 1, February 1998.

¹⁸⁴⁴ Analogous to the speech of WILS during 9th ASCOLA Conference Procedural Fairness in Competition Proceedings, Warsaw, 26-28 June 2014.

¹⁸⁴⁵ B. Zanettin, *Cooperation between Antitrust Agencies at the International Level*, Portland, Hart Publishing, 2002, 128.

expressed by the business community.¹⁸⁴⁶ Concerns therefore seem to be stronger in the field of competition law than in other fields. At the same time, the Report established that “*the tools specified by the IAEAA are more powerful than those established by the enabling legislation in other areas.*”¹⁸⁴⁷ The IAEAA created similar powers to those created by MLATs and tax treaties and attributed powers to competition law enforcement authorities going beyond those attributed to securities and customs authorities,¹⁸⁴⁸ but in contrast to these other areas, the powers are not used as much.¹⁸⁴⁹

CONNOLLY hinted at the fact that the US might have strategically enacted the IAEAA to avoid the creation of a strict international code of minimum standards. This is in contrast, however, with the area of financial law, where the US did agree to the establishment of minimum standards in regulating financial institutions, in order to strengthen the confidence and integrity in the international financial system. In most financial law areas international cooperation is intensifying, likely to catch-up to market innovations, but this does not happen in competition law. He concluded that the US only pursues harmonisation when it benefits the nation, such as in the fields of securities regulation or banking, but refuses to do so when it is believed that harmonisation would hurt the national economy, as in antitrust or insider trading. He rightly underlined that this line of thought fails to recognise the interconnectedness of markets in a global economy.¹⁸⁵⁰

Some barriers therefore do not seem to exist when information is exchanged in the investigation of tax or finance-related violations for instance, which could be categorized as financial offences, as could competition law infringements.¹⁸⁵¹ HAMMOND, former Director of Criminal Enforcement of the Antitrust Division of the US Department of Justice and Deputy Assistant Attorney General for Criminal Enforcement, stated that “*cartel offences are no different than other crimes of deceit or fraud*”,¹⁸⁵² and yet, public perception of both types of offences seem to differ significantly. While the amount of global cartel overcharges has been greater in some cartel cases than in the biggest and most newsworthy accounting frauds, relative to other corporate crimes, newspapers, politicians, and the public seem to be indifferent to cartel crimes.¹⁸⁵³ Cartels for some reason do not generate the same type of hostility as do perpetrators of securities or accounting fraud, at least in the US. Perhaps this is the case in part because wrongdoings are more obvious, while in competition law there can be ambiguity about the existence of a transgression and the government can even be seen to encourage them, for instance with regard to the exemption of export cartels.¹⁸⁵⁴ Although the factual intricacies, the complexities of criminal versus administrative enforcement, parallel private and public enforcement, and the interconnectedness of competition policy with for instance industrial and trade

¹⁸⁴⁶ L. Laudati, *Study of exchange of confidential information agreements and treaties between the US and Member States of the EU in areas of securities, criminal, tax and customs*, Luxembourg, Office for Official Publications of the European Communities, 1996, 7-11.

¹⁸⁴⁷ Ibid., 11.

¹⁸⁴⁸ Ibid., 12.

¹⁸⁴⁹ OECD, *International Co-operation – Stocktaking Exercise of the Competition Committee’s Past Work*, DAF/COMP/WP3(2012)5, 12 June 2012, 12.

¹⁸⁵⁰ W. Connolly, “Lessons to be learned: the conflict in international Antitrust law contrasted with progress in international financial law”, *Fordham Journal of Corporate and Financial Law*, Vol. 6, No.1, 2001, 245-246.

¹⁸⁵¹ S. Hammond, “Beating cartels at their own game – sharing information in the fight against cartels”, presented at the Inaugural Symposium of the Competition Policy Research Center - Fair Trade Commission of Japan, Tokyo, 20 November 2003, 2.

¹⁸⁵² Ibid., 6.

¹⁸⁵³ As measured by how newsworthy a story a cartel case is.

¹⁸⁵⁴ D. Daniel Sokol, “Cartels, corporate compliance, and what practitioners really think about enforcement”, *Antitrust Law Journal*, Vol. 78, No. 1, 2012, 218-219.

policy do make competition law a complex area of law with its own particularities,¹⁸⁵⁵ it does not justify stepmotherly treatment in the international arena.

This section explores the most commonly suggested possibilities for cooperation that may be transposed from other policy fields. It should, however, be clearly stated that such an undertaking, if done comprehensively, would merit a separate doctoral study. This section therefore comes with the clear disclaimer that it merely provides ideas for further multilateral work on this matter on an exemplary basis, and has no intention to be comprehensive both in breath or in depth.

4.2.1 Previous efforts to look over the wall

Already in 1993, an OECD Secretariat note on Mutual Assistance Agreements drew the attention to potential lessons to be learned from existing international agreements in fields as taxation, money laundering and securities, in particular how such agreements dealt with the treatment of confidential information, the types of assistance, the bilateral or multilateral nature of the agreement and common denominators.¹⁸⁵⁶ The note showed that information exchange in these fields had not been hampered by confidentiality protections. Assistance was not limited to the transfer of information that was already in possession of the authority, various joint investigations were possible as well. The note also came to the conclusion that bilateral and multilateral agreements generally complemented each other.¹⁸⁵⁷ In 1994 another paper was issued, dealing with Effective Co-operation in International Antitrust Enforcement: Confidential Information Sharing and other Essential Mutual Assistance.¹⁸⁵⁸ This paper developed a list of principles to guide and encourage confidential information exchange in the field of competition law enforcement. It did so by studying information exchanges in other law enforcement areas where international cooperation commonly occurred. The paper described the need for confidential information exchange as ‘pressing’.¹⁸⁵⁹

The aforementioned Laudati Report in 1996 again devoted attention to other policy areas as sources of inspiration for international competition cooperation. Potential lessons from other policy areas have reoccurred on a regular basis as OECD Competition Committee topic, most recently during the 2012 Roundtable on Improving International Co-operation in Cartel Investigations, where the importance of multilateral instruments, the commitment to implement and enforce, and the development of common standard definitions were underlined.¹⁸⁶⁰ The OECD background note to the 2012 Global Forum on Competition again stressed that certain challenges to international cooperation could be overcome by exploring avenues that were followed in other policy areas.¹⁸⁶¹ This was also stated by the US in its contribution to the OECD Competition Committee discussion on international cooperation: “[f]or the future, OECD member agencies should look to incorporate new ways of thinking and new, or to date unexplored, ways of working together to facilitate cooperation. This includes thinking

¹⁸⁵⁵ Interview with Commission official.

¹⁸⁵⁶ OECD, Mutual Assistance Agreements, Secretariat Note, DAF/CLP/WP3(93)3, 1993.

¹⁸⁵⁷ OECD, International Co-operation – Stocktaking Exercise of the Competition Committee’s Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 7-8.

¹⁸⁵⁸ OECD, Issues Paper Effective Co-operation in International Antitrust Enforcement: Confidential Information Sharing and other Essential Mutual Assistance, DAF/CLP/WP3(94)1, 1994.

¹⁸⁵⁹ OECD, International Co-operation – Stocktaking Exercise of the Competition Committee’s Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 11, 34.

¹⁸⁶⁰ Ibid., 33.

¹⁸⁶¹ OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Background Note, DAF/COMP/GF(2012)6, 13 February 2012, 4.

*creatively to learn from others' experience, including from cooperation experience in other disciplines.*¹⁸⁶² JENNINGS, head of competition outreach at the OECD, equally considered that enforcement agencies should consider more revolutionary approaches towards more effective cooperation, whereby they could gather inspiration by looking at international cooperation in other areas of law enforcement, and approaches under multilateral frameworks with functioning information sharing systems.¹⁸⁶³ Not much in-depth follow-up seems to have occurred since then. References to other policy fields have remained scarce and superficial.¹⁸⁶⁴ They are often descriptive and do not analyse practical issues that may occur when attempting to transpose other systems. Indeed, the OECD Competition Committee for instance never went beyond a mere review of other policy experiences to discuss in detail if and how they could be transferred to international cooperation in competition cases.¹⁸⁶⁵

4.2.2 Tax policy

4.2.2.1 Open multilateral initiatives supporting bilateralism

As is clear from the above, one area of law enforcement often referred to as source of inspiration for competition law cooperation is tax policy. It is said that the challenges and obstacles that tax enforcers are confronted with when attempting to share information are very similar or even identical to those of competition authorities. Examples are double incrimination issues, (bank) secrecy restrictions, general legal restrictions to information exchange, such as the inability of the receiving jurisdiction to make full use of transmitted information, and the prioritisation of domestic demands over overseas information requests.¹⁸⁶⁶

Generally international cooperation among tax authorities takes the form of co-decision making among agencies in different policy areas, multilateral discussions aimed at reaching consistency in approaches to different issues, and cooperation in individual cases. It includes cooperation in assessing tax debts or auditing taxpayers, cooperation in investigating tax fraud, both civil and criminal, and intelligence sharing.¹⁸⁶⁷ In 2000 the Global Forum on Transparency and Exchange of Information for Tax Purposes was established within the OECD.¹⁸⁶⁸ It has manifested itself as the primary transnational venue for combating tax evasion and had important practical effects. It is seen as a typical transnational policy network (see below, Part III, 2.3.1), and uses best-practice standards.

¹⁸⁶² OECD, Discussion on International Co-operation, Contribution of the United States, DAF/COMP/WP3/WD(2012)24, 12 June 2012, 10.

¹⁸⁶³ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 310.

¹⁸⁶⁴ See, for instance, OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 48-54. The report stated that it may be interesting to learn from cooperation experiences in other policy areas. The report itself only briefly touched upon cooperation in tax cases. No explanation is given for the choice for this policy area, rather than other areas where information is commonly exchanged, such as anti-corruption, securities, or money laundering. No mention is made either of the Laudati Report, which dealt with similar issues.

¹⁸⁶⁵ OECD, International Co-operation – Stocktaking Exercise of the Competition Committee's Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 16.

¹⁸⁶⁶ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 53.

¹⁸⁶⁷ Ibid., 311.

¹⁸⁶⁸ See <http://www.oecd.org/tax/transparency/> (accessed June 2017).

However, to put pressure on countries to accept the standards on transparency and exchange of information, lists were created of compliant and non-compliant jurisdictions.¹⁸⁶⁹

The Global forum was further institutionalised in 2009. It was given increased independence from the OECD via the establishment of a self-financing mechanism based on member contributions, by inviting new members committed to implementing its standards, and via the establishment of a Steering Group, a Peer Review Group, and a permanent secretariat hosted within the OECD. This sets the tax forum apart from other Global Forums. It has also distinguished itself by giving greater attentiveness to inclusion and therefore legitimacy, by including developing country actors and issues, which according to KIRTON has contributed to its success.¹⁸⁷⁰ Another feature that is distinctive is that the forum allows sub-sets of states to go beyond existing standards and require higher standards for their own taxpayers, creating upward pressure on the global standards. Moreover, the OECD underlined that a jurisdiction may not rest on its laurels when it has signed the minimum twelve bilateral agreements to be compliant with existing standards, but must continue to sign agreements even after it has reached this threshold.¹⁸⁷¹ It must be mentioned that in the context of tax cooperation power imbalances play a role as well. The twelve or more tax information exchange agreements that countries are required to sign have tended to be bilateral. Considering the resources that the negotiation of such agreement requires, this system favours more powerful countries that have a greater capacity to negotiate agreements.¹⁸⁷²

One of the Forum's most significant accomplishments is the 2002 Model Agreement on Exchange of Information on Tax Purposes. The model agreement is not a binding instrument, but contains two models for agreements. It is presented as both a multilateral instrument and a model for bilateral treaties or agreements. What is interesting is that the multilateral instrument is not a traditional multilateral agreement, but provides the basis for an integrated bundle of bilateral treaties. A party that wishes to adhere to the multilateral Agreement must specify the party or parties vis-à-vis which it wishes to be bound. When the Agreement enters into force, it only creates rights and obligations between those parties that have mutually identified each other in their instruments of ratification, approval or acceptance that have been deposited with the depositary of the Agreement. The bilateral agreement is included as a model for bilateral exchange of information. What is interesting as well is that the model includes a detailed commentary intended to illustrate or interpret every provision. The model even suggests what parties should do if they wish to ensure that the Commentary is an authoritative interpretation, rather than its relevance being determined by principles of international law.¹⁸⁷³

While it is not relevant to discuss the entire Model Agreement at this point, some interesting provisions are selected that may be of use in bilateral competition cooperation agreements. Article 4(2) for instance foresees that any concept that is not defined in the Agreement, will have the meaning that it has at when the Agreement is applied under the law of that Party, any meaning under the applicable tax laws of that Party prevailing over a meaning given to the term under other laws of

¹⁸⁶⁹ J. Kirton, "Global forum on Transparency and Exchange of Information for Tax Purposes" in T. Hale & D. Held (eds), *Handbook of transnational governance – institutions and innovations*, Cambridge, Polity Press, 2011, 61-62.

¹⁸⁷⁰ Ibid., 62-63.

¹⁸⁷¹ T. Porter & V. Rubio Vega, "Global forum on Transparency and Exchange of Information for Tax Purposes" in T. Hale & D. Held (eds), *Handbook of transnational governance – institutions and innovations*, Cambridge, Polity Press, 2011, 65.

¹⁸⁷² J. Kirton, "Global forum on Transparency and Exchange of Information for Tax Purposes" in T. Hale & D. Held (eds), *Handbook of transnational governance – institutions and innovations*, Cambridge, Polity Press, 2011, 63.

¹⁸⁷³ OECD, Model Agreement on Exchange of Information in Tax Matters, April 2002 (Model Agreement).

that Party, unless the context otherwise requires. Article 5 on the exchange of information upon request obliges the parties to provide information, while Article 7 mentions the possibilities to decline a request. This approach still allows the parties to refuse cooperation, but provides extra stimulus to do so, in comparison to the very discretionary provisions in competition cooperation agreements. The Model Agreement not only foresees information exchange, but also the execution of tax examinations abroad, more specifically the interviewing of individuals and the examination of records, with the written consent of the persons concerned.¹⁸⁷⁴

The Commentary to the Model Agreement clarifies that information exchange under the Agreement is limited following a standard of foreseeable relevance. The information that the applicant Party must provide to the requested Party in order to demonstrate the foreseeable relevance of the information requested is specified in the Agreement. This standard must ensure exchange of information in tax matters to the widest possible extent while at the same time countering fishing expeditions or requests of information that is unlikely to be relevant to the tax affairs of a given taxpayer. The Commentary gives some examples to illustrate the application of the requirements in certain situations. This requirement, implying that tax authorities requesting information from another jurisdiction must have a good documented reason to suspect an individual or firm and must limit their request to that case, was identified by some as a weakness of the agreement, since “*tax evasion usually involves concealment of exactly the type of information that the authorities would need to document suspicions sufficiently to request assistance.*”¹⁸⁷⁵ A second limitation is that the Agreement only covers exchange of information upon request. This is explained to mean when the information requested relates to a particular examination, inquiry or investigation. Automatic or spontaneous exchanges of information are not covered. The Commentaries, however, do encourage Contracting Parties to consider expanding their cooperation.

The Agreement furthermore aims to establish a balance between the rights granted to persons in the requested Party and the need for effective exchange of information. Rights and safeguards are for instance not overridden simply because they could operate to prevent or delay effective exchange of information, but they should not be applied in a manner that unduly prevents or delays effective exchange of information. An example are notification requirements: if a requested Party’s laws require prior notification, this party should ensure that this does not frustrate the efforts of the party seeking the information, depending on the circumstances of the case, by for instance permitting exceptions from prior notification in cases in which the information request is of a very urgent nature or the notification is likely to undermine the chance of success of the investigation.

Apart from the Model Agreement, dealing with information exchange, the Convention on Mutual Administrative Assistance in Tax Matters was created. This convention was developed jointly by the OECD and the Council of Europe already in 1988 and was later amended by Protocol in 2010. It is labelled as the most comprehensive multilateral instrument available for all forms of administrative tax cooperation between states in the assessment and collection of taxes, to tackle tax evasion and avoidance. Apart from different forms of information exchange, also joint investigations are dealt with and other forms of work sharing. The Convention is made very accessible, providing a flyer in English and Spanish, which contains a brief overview on the Convention. The Convention itself is

¹⁸⁷⁴ Article 6 Model Agreement.

¹⁸⁷⁵ T. Porter & V. Rubio Vega, “Global forum on Transparency and Exchange of Information for Tax Purposes” in T. Hale & D. Held (eds), *Handbook of transnational governance – institutions and innovations*, Cambridge, Polity Press, 2011, 65.

available in English, French, and an unofficial Spanish and Portuguese translation.¹⁸⁷⁶ Again, an explanatory report provides additional clarity with regard to the implementation of the convention.¹⁸⁷⁷

Another initiative deserving to be mentioned is the Manual on Information Exchange approved by the OECD Committee on Fiscal Affairs in 2006. It is intended to provide practical assistance to officials dealing with exchange of information for tax purposes and was developed with the input of both member and non-member countries. The Manual has a modular structure and evolves from a more general discussion of practical and legal aspects of exchange of information to specific ways of sharing information included in various OECD instruments, dealing for instance with exchange of information on request, spontaneous information exchange, automatic (or routine) exchange of information, and industry-wide exchanges of information.¹⁸⁷⁸ However, it also covers simultaneous tax examinations, tax examinations abroad, country profiles regarding information exchange, information exchange instruments and models, as well as a module on joint audits, an innovative form of cooperation between countries. A Joint Audit involves the coordination of an audit of one or more related taxable persons (both legal entities and individuals) between countries, where the audit focus has a common or complementary interest and/or transaction.¹⁸⁷⁹ The way the manual is set up, with separate modules, allows countries to put together their own tailored manual, incorporating only the modules that are relevant to their specific information exchange programmes.¹⁸⁸⁰ Joint investigations occur on a relatively frequent basis, and appear to be more documented than cooperation in competition cases.¹⁸⁸¹ Most recently, in the wake of the Panama-paper revelations, tax officials from 28 nations met to develop a strategy for collaborative action, for one of the largest joint tax investigations in history.¹⁸⁸²

Tax authorities, finally, can count on access to information gathered by authorities other than their peers.¹⁸⁸³ As an example so-called ‘*operation green fees*’ can be mentioned. This case involved the global prosecution of criminal networks involved in an estimated 5 billion Euro worth of damages to European taxpayers, caused by VAT-fraud within the EU Emission Trading System. Both law enforcement and tax authorities cooperated. According to the OECD, the success of the operation can be attributed to the fact that extensive use was made of international cooperation tools, taking advantage of the different legal bases used for both civil and criminal procedures, as well as the fact that cooperation on intelligence took place with Tax Administrations, Customs, Financial

¹⁸⁷⁶ OECD and Council of Europe, The Multilateral Convention on Mutual Administrative Assistance in Tax Matters, Amended by the 2010 Protocol, 2011.

¹⁸⁷⁷ OECD, Text of the revised explanatory report to the convention on mutual administrative assistance in tax matters as amended by protocol.

¹⁸⁷⁸ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 52.

¹⁸⁷⁹ OECD, Sixth Meeting of the OECD Forum on Tax Administration, Istanbul, 15-16 September 2010, Joint Audit Report.

¹⁸⁸⁰ OECD, Committee on Fiscal Affairs, Manual on Information Exchange, available at <http://www.oecd.org/tax/exchange-of-tax-information/cfaapprovesnewmanualoninformationexchange.htm> (accessed July 2017).

¹⁸⁸¹ See for instance X., “Joint investigation by Dutch FIOD and British HMRC into hiding money in a different country”, 5 April 2017, available at <https://www.om.nl/actueel/nieuwsberichten/@98616/joint-investigation/> (accessed May 2017).

¹⁸⁸² M. Hamilton, “Global joint investigation to be proposed at special tax meeting”, 12 April 2016, available at <https://panamapapers.icij.org/20160412-global-tax-officials-meeting.html> (accessed May 2016).

¹⁸⁸³ See, for instance, OECD, Access for tax authorities to information gathered by anti-money laundering authorities, September 2007.

Intelligence Unit Authorities and police forces.¹⁸⁸⁴ This does not seem to occur, or at least is not regulated to large extent for competition authorities wishing to use information gathered by other enforcement authorities.

4.2.2.2 Inspiration

The particularities leading to successful international cooperation in tax may serve as inspiration for further advancements in the field of competition law. A first aspect worth considering is further structuring exchanges of information. While information can indeed be exchanged on request, automated exchange of generic information could be more advanced. Automatic or routine exchange of information in tax cases involves the systematic and periodic transmission of ‘bulk’ taxpayer information by the source country to the residence country concerning various categories of income. Sector analyses could be shared in this manner among countries for instance. The variety of types of information sharing mechanisms in tax cooperation demonstrates the merit of formalising and categorising information exchange in a legal framework, with ensuing duties and obligations between authorities. It demonstrates a certain level of commitment that is absent in cooperation between competition authorities, at least as reflected in their formalised international obligations.¹⁸⁸⁵

Lessons could also be learned from the work sharing arrangements among tax officials. Both in the EU and internationally representatives of one country are allowed to be present and gather information during a tax inspection in the territory of another state, and joint audits and tax examinations abroad are held.¹⁸⁸⁶ This type of investigative assistance is still excluded in most competition cooperation agreements. It is remarkable that tax officials have much more practical guidance to their disposal in the form of practical cooperation manuals but also explanatory statements accompanying international agreements, clarifying the exact meaning of the provisions via examples and other additional information. Such assistance should also be present in competition law.

Most importantly, international cooperation in tax law enforcement is based on an open multilateral system encouraging bilateralism.¹⁸⁸⁷ The bilateral and multilateral system are more interwoven than in the competition law system, and seem to generate benefits that are absent in the latter. The manner in which model agreements are set up allow for advanced tailoring, for instance via the modular approach, and while providing hard obligations, the system of opt-in ensures that countries are not forced into commitments they do not feel ready for. While most of the above suggestions are not unknown to the OECD, multilateral competition law forums should dare to dig deeper and build further on these ideas, to see what it would take to successfully transpose such a system to a competition law environment.

4.2.3 Criminal law: MLATs

4.2.3.1 Definition and use

¹⁸⁸⁴ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 51.

¹⁸⁸⁵ Ibid., 50, footnote 135, 54, 319.

¹⁸⁸⁶ Ibid., 50, 54.

¹⁸⁸⁷ Ibid., 54.

Mutual Legal Assistance Treaties (MLATs) are instruments with a broad horizontal application across multiple enforcement areas.¹⁸⁸⁸ The UK-US MLAT for instance has been used in instances from money laundering to drugs offences.¹⁸⁸⁹ This type of agreement has bloomed since the 1970s, mainly upon initiative of the US DoJ and State Department. The US has signed MLATs with 19 American countries and is party to the Inter-American Convention on Mutual Legal Assistance.¹⁸⁹⁰ They are concluded in view of assisting cross-border criminal law enforcement, by permitting the sharing of investigative information and the obtaining of documents and evidence located abroad via the use of investigative powers for use in criminal prosecutions by the other nation.¹⁸⁹¹

The OECD's 2012 Policy Roundtable on Improving International Cooperation in Cartel Investigations stated that MLATs are generally "*the most effective means of cross-border evidence gathering in competition cases.*"¹⁸⁹² Nevertheless, competition law is often excluded from such agreements, either because of unwillingness to commit to the hard obligations contained in such agreements,¹⁸⁹³ or due to the dual criminality requirements usually included in such agreements, excluding countries with civil competition law systems.¹⁸⁹⁴ Criminal antitrust sanctions remain relatively rare,¹⁸⁹⁵ which may explain why up to 2005 it was stated that "*Multilateral Legal Assistance Treaties have not previously been studied by trade and competition specialists.*"¹⁸⁹⁶ Nevertheless, even though MLATs were initially intended for use in conventional criminal prosecutions, their scope has progressively expanded. Some more recent MLATs expressly contemplate competition law criminal prosecutions.¹⁸⁹⁷ The most well-known example of an MLAT applicable in competition cases, even if it does not refer to competition law specifically, is the one between Canada and the US.¹⁸⁹⁸ It has been said that the confidential

¹⁸⁸⁸ "They provide a mechanism for the signatories to obtain a wide variety of legal assistance for criminal matters generally, including the compulsory taking of evidence on oath and the execution of searches of domestic and business premises." Ibid., 29.

¹⁸⁸⁹ P. Holmes, H. Müller, A. Papadopoulos, & A. Sydorak, "A Taxonomy of International Competition Cooperation Provisions", paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 55.

¹⁸⁹⁰ Ratified by 13 additional American states. See <http://globalinvestigationsreview.com/benchmarking/the-investigations-review-of-the-americas-2017/1067471/international-cartel-investigations-in-the-united-states> (accessed June 2017).

¹⁸⁹¹ M. Taylor, *International Competition Law: a new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 113.

¹⁸⁹² OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 29.

¹⁸⁹³ "MLATs oblige the parties to assist each other by obtaining evidence located on the requested nation's territory and, it is not permissible for the requested country to refuse its aid unless the offence is political or military, or compliance would jeopardize national security or prejudice its own investigations." Ibid., 29. One can therefore not rely on a lack of available resources for instance to refuse to cooperate, unlike in 'soft' enforcement cooperation agreements.

¹⁸⁹⁴ This requirement implies that the behaviour at stake should be characterized as a crime in all jurisdictions involved. W. Connolly, "Lessons to be learned: the conflict in international Antitrust law contrasted with progress in international financial law", *Fordham Journal of Corporate and Financial Law*, Vol. 6, No.1, 2001, 218.

¹⁸⁹⁵ E. Swaine, "Cooperation, Comity, and Competition Policy: United States," in A. Guzman (ed.), *Cooperation, Comity, and Competition*, New York, Oxford University Press, 2011, 19.

¹⁸⁹⁶ P. Holmes, H. Müller, A. Papadopoulos, & A. Sydorak, "A Taxonomy of International Competition Cooperation Provisions", paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 66.

¹⁸⁹⁷ See, for example, Treaty between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters, Bern, 25 May 1973, entered into force 23 January 1977. M. Taylor, *International Competition Law: a new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 113.

¹⁸⁹⁸ Treaty between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters, Québec, 18 March 1985.

information exchange permitted by this MLAT enabled a number of successful cross-border criminal prosecutions against cartel behaviour. Because virtually all of the international cartels prosecuted by the US also operated in Canada in recent years, cooperation between the two countries has been crucial.¹⁸⁹⁹ Canadian prosecutions of cross-border cartels uncovered by the DoJ allowed for the imposition of enormous Canadian fines, which would have been impossible in the absence of the MLAT. It was the success of the US-Canada MLAT that allegedly enticed the US to extend its ability to enter into competition law MLATs with other nations.¹⁹⁰⁰

The assistance that may be offered under an MLAT is extensive. The US-Canada MLAT, for instance, permits the coordination of enforcement activities, provides legal tools to jointly analyse documents, allows exchange of information and regular meetings to discuss matters of mutual interest.¹⁹⁰¹ An MLAT moreover allows one party to request assistance in gathering evidence located on the requested nation's territory in a criminal investigation to the designated central authority of the other party.¹⁹⁰² Such an authority generally is a ministry of justice or its equivalent. While the US-Canada MLAT does not explicitly mention antitrust authorities, the US Antitrust Division of the DoJ and the CCB actively contribute to the implementation of the MLAT.¹⁹⁰³

Assistance generally includes taking testimony and statements in the requested jurisdiction (subpoenas for documents or testimony and witness interviews), providing documents or records located in the requested jurisdiction, executing requests for searches and seizure, and in some cases, any other form of assistance that is not prohibited by the laws of the requested jurisdiction or consistent with the objects of the treaty.¹⁹⁰⁴ In the US, such assistance may toll the statute of limitations for a crime while the request is pending.¹⁹⁰⁵ MLATs usually define whether or not the information that is shared will be used for criminal prosecutions or civil antitrust cases.¹⁹⁰⁶

As mentioned, MLATs generally contain hard law commitments, obliging the parties to assist each other. Refusal by the requested jurisdiction of a request made in conformity with the treaty is

¹⁸⁹⁹ P. Holmes, H. Müller, A. Papadopoulos, & A. Sydorak, "A Taxonomy of International Competition Cooperation Provisions", paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 52.

¹⁹⁰⁰ M. Taylor, *International competition law – A new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 114.

¹⁹⁰¹ P. Holmes, H. Müller, A. Papadopoulos, & A. Sydorak, "A Taxonomy of International Competition Cooperation Provisions", paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 52-54.

¹⁹⁰² <http://globalinvestigationsreview.com/benchmarking/the-investigations-review-of-the-americas-2017/1067471/international-cartel-investigations-in-the-united-states> (accessed June 2017).

¹⁹⁰³ Both authorities work together under the MLAT, but also under a Memorandum of Understanding, the 1995 Bilateral Agreement on the Application of Their Competition and Deceptive Marketing Practices Laws, and an Agreement on Positive Comity. P. Holmes, H. Müller, A. Papadopoulos, & A. Sydorak, "A Taxonomy of International Competition Cooperation Provisions", paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 53.

¹⁹⁰⁴ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 15.

¹⁹⁰⁵ <http://globalinvestigationsreview.com/benchmarking/the-investigations-review-of-the-americas-2017/1067471/international-cartel-investigations-in-the-united-states> (accessed June 2017).

¹⁹⁰⁶ W. Connolly, "Lessons to be learned: the conflict in international Antitrust law contrasted with progress in international financial law", *Fordham Journal of Corporate and Financial Law*, Vol. 6, No.1, 2001, 233.

generally restricted to reasons of the offence being political or military, or if complying with the request would prejudice the sovereignty, security, important public policy, or essential interests of the nation or interfere with its own criminal investigations. If a request or assistance would relate to an offender who could not be proceeded against in the requested jurisdiction because of previous acquittal or conviction for the offence, aid may equally be refused.¹⁹⁰⁷ If assistance is denied, the requested state is under the obligation to justify its decision.¹⁹⁰⁸

An ICN Report from 2007 revealed that the competition agencies of Australia, Brazil, Canada, Israel, Switzerland and the USA had MLATs with other jurisdictions which can or potentially could be used for cartel cases.¹⁹⁰⁹ In 1999, the US signed MLATs with Japan and Brazil aimed at opening up those markets to US competition.¹⁹¹⁰ Generally, however, even when the use of MLATs has been extended from classical criminal matters into the area of competition and antitrust, it is still commonly required that criminal law applies in at least one jurisdiction to be used in competition cases.¹⁹¹¹ A dual criminality requirement often prevents a criminal jurisdiction from cooperating with a civil or administrative jurisdiction.¹⁹¹² However, the US-Italy and US-Spain MLATs for instance do not make dual criminality a prerequisite for assistance so they could be used to a certain extent in competition matters,¹⁹¹³ unless competition policy is explicitly excluded, such as in the US-Switzerland or Canada-Germany MLATs.¹⁹¹⁴ The US-UK MLAT originally did not apply to competition investigations as clarified in the accompanying interpretative notes.¹⁹¹⁵ Seven years after the conclusion of the Treaty,

¹⁹⁰⁷ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 16; P. Holmes, H. Müller, A. Papadopoulos, & A. Sydorak, “A Taxonomy of International Competition Cooperation Provisions”, paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 50.

¹⁹⁰⁸ P. Holmes, H. Müller, A. Papadopoulos, & A. Sydorak, “A Taxonomy of International Competition Cooperation Provisions”, paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 53-54.

¹⁹⁰⁹ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 16.

¹⁹¹⁰ W. Connolly, “Lessons to be learned: the conflict in international Antitrust law contrasted with progress in international financial law”, *Fordham Journal of Corporate and Financial Law*, Vol. 6, No.1, 2001, 233.

¹⁹¹¹ P. Holmes, H. Müller, A. Papadopoulos, & A. Sydorak, “A Taxonomy of International Competition Cooperation Provisions”, paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 49-50.

¹⁹¹² Often the use of exchanged information is limited to the purposes for which it was collected, preventing “an authority from a civil/administrative system from sharing information with a criminal jurisdiction if the information can ultimately be used to impose criminal sanctions. Similarly this would prevent an authority from a civil/administrative system which provides only for corporate fines from sharing information with another authority (whether with a criminal or a civil/administrative enforcement system) which can impose sanction on individuals.” (OECD, Limitations and constraints to international co-operation, Issues paper by the secretariat, DAF/COMP/WP3(2012)8, 23 October 2012, 10).

¹⁹¹³ P. Holmes, H. Müller, A. Papadopoulos, & A. Sydorak, “A Taxonomy of International Competition Cooperation Provisions”, paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 50.

¹⁹¹⁴ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 15.

¹⁹¹⁵ Agreement between the Government of the United States and the Government of the United Kingdom of Great Britain and Northern Ireland on Mutual Legal Assistance in Criminal Matters, Washington, 6 January 1994.

however, the provisions excluding criminal prosecutions in competition cases from the MLAT were deleted via an exchange of notes between the UK and US governments.¹⁹¹⁶

4.2.3.2 Limitations

While the US-Canada MLAT can be considered quite successful, this is not the case for all MLATs. While the US has concluded many MLATs allowing application in competition law, it is said that “*their impact on antitrust investigations in the Americas is limited.*”¹⁹¹⁷ Some American countries have simply not executed the MLAT with the US, and it is estimated that over half of the bilateral US MLATs are with small island nations unlikely to be involved in international cartel enforcement.¹⁹¹⁸

Apart from the fact that the double criminality requirement often excludes parties from concluding an MLAT for competition law purposes, other limitations apply as well. Due to the intended use of the information exchanged in criminal cases, the process of requesting assistance under an MLAT can be slow and cumbersome.¹⁹¹⁹ MLATs indeed generally function via the more formal criminal justice enforcement channels rather than the somewhat more flexible administrative ones. This may result in longer proceedings, also due to the possibility of legal challenges.¹⁹²⁰ The specific details and procedures of cooperation under MLATs can be subject to the requirements of both the requesting and the requested jurisdiction. Some jurisdictions may for instance require that evidence gathered by another jurisdiction needs to be gathered respecting the rights of defence applied in the requesting jurisdiction, such as the presence of a lawyer, in order to be valid in court. It is equally possible that certain investigatory methods available to the requesting jurisdiction may not be available to the requested jurisdiction, such as the interception of private communications.¹⁹²¹

Finally, MLATs suffer from the same illness as bilateral cooperation agreements, namely that little information is available on their functioning. There is not much information in the literature either on the use of MLATs in competition matters as requests for information are not public. Most information is available on the US-Canada MLAT, but others have remained rather opaque.¹⁹²² Their limited availability excludes them from being an alternative to traditional cooperation agreements, but lessons can be learned in terms of the stronger commitment to cooperation included in MLATs.

5. Intermediate conclusion Part II

¹⁹¹⁶ P. Holmes, H. Müller, A. Papadopoulos, & A. Sydorak, “A Taxonomy of International Competition Cooperation Provisions”, paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 54-55.

¹⁹¹⁷ <http://globalinvestigationsreview.com/benchmarking/the-investigations-review-of-the-americas-2017/1067471/international-cartel-investigations-in-the-united-states> (accessed June 2017).

¹⁹¹⁸ Ibid.

¹⁹¹⁹ Ibid.

¹⁹²⁰ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 30; OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 43.

¹⁹²¹ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 16.

¹⁹²² P. Holmes, H. Müller, A. Papadopoulos, & A. Sydorak, “A Taxonomy of International Competition Cooperation Provisions”, paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 50, 55.

This study answers the question whether and to what extent both first and second generation bilateral dedicated competition cooperation agreements have contributed to the enhancement of international antitrust enforcement, by improving the ability of competition authorities to cooperate. This in turn determines whether such agreements have added utility compared to other cooperation mechanisms and whether the EU should further invest in their negotiation and conclusion. Such an assessment evidently begins with the identification of appropriate benchmarks. A starting point in this process were the stated aims of the agreements themselves. An evolution was witnessed in this regard from a focus on mere conflict avoidance to the creation of additional effectiveness and efficiency in competition law enforcement. Seven benchmarks were developed for the purpose of this study. Because data on instances of cooperation are limited and superficial, and because counterfactuals are impossible to establish, benchmarks were created by breaking down described benefits from cooperation from earlier multilateral efforts to assess cooperation as well as feedback from practitioners. The aim was to assess the long-term potential of the agreements. It was thereby important to mainly analyse the text of the agreements, and its inherent value as a cooperation instrument.

The cooperation mechanisms generally present in first generation agreements include best endeavour obligations regarding notification, exchange of non-confidential information, general cooperation and coordination of enforcement activities, a negative and positive comity principle, and consultation requirements. As mentioned, DG COMP's recent management plans indicated that the EU no longer intends to invest in first generation agreements. The above analysis revealed that these agreements as they exist today indeed do not continue to offer added value, as the benefits of first generation agreements do not outweigh the cost of their negotiation. The 2012 OECD/ICN Joint Survey indicated that first generation bilateral competition agreements do not appear to be used very often, despite their availability and perceived relevance (see figure 2 above, Introduction).¹⁹²³ A partial explanation is offered by the fact that a lot of cooperation is done informally and is not included in the overview. Nevertheless, this is an indication that the agreements generally served to formalise existing practice, fulfilling a mere symbolic role. This role should not be underestimated, however. First generation agreements have created momentum and did have an impact, as illustrated for instance by the increase in the number of notifications between the US and the EU. Nevertheless, first generation competition cooperation agreements generally only provide a formal framework for existing cooperation and do not overcome legal barriers.¹⁹²⁴ The context in which and for which first generation agreements were developed is very different than the international environment in which they operate today. The number of competition authorities actively enforcing national competition laws has increased tremendously, with around 600%. Added to this is the rise in international

¹⁹²³ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 8. Also see M. Martyniszyn, "Discovery and Evidence in Transnational Antitrust Cases: Current Framework and the Way Forward", Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law; University College Dublin - School of Law, 2012, 33, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2142978 (accessed August 2016), 7-9. The numbers represent a score on a scale ranging from 1 to 5, 1 being 'not relevant' and 5 being 'very relevant'. Agencies were asked to assign a score to each instrument. An average score was calculated by dividing the sum of scores provided by respondents by the number of respondents who provided a score for each instrument. Respondents did not mark a score for categories of legal instruments which they did not indicate as available to them, the average scores only represent the relevance of legal instruments to those jurisdictions to which they are available.

¹⁹²⁴ P. Marsden, "The curious incident of positive comity - the dog that didn't bark (and the trade dogs that just might bite)" in A.T. Guzman (ed.), *Cooperation, comity, and competition policy*, New York, Oxford University Press, 2011, 304.

mergers and acquisitions with about 250 to 300%.¹⁹²⁵ Cooperation has therefore become much more common, but simultaneously it has also become more complex, and the agreements as they exist now fall short in addressing such challenges.

The hybrid legal nature of first generation agreements – formal and binding in form, but inherently unenforceable due to soft obligations – results in high negotiating cost with little added value. The level of legalization has not reached an optimal level compared to the goals and content of the agreement. Some of the benefits of soft law are lost in the context of international competition cooperation via first generation agreements as they exist now. The most obvious cost is that some of the flexibility in the procedure is lost, meaning that contracting and implementation costs will be higher. First generation agreements did, however, provide for a certain breakthrough in the deadlock that was present in the multilateral scene, and in that sense their formality might have been a benefit as it offered additional credibility. Moreover, after some initial struggles in the form of the *France v. Commission* case, first generation agreements did not cause a disruption in the institutional balance of the EU, a debate in which MoUs take up a more controversial role. The competence rules of the EU prevented the emergence of an agency-to-agency type agreement. MoUs concluded merely on behalf of the Commission remain possible, but the type of commitments that can be included in such instruments is limited as they cannot affect EU external relations policy. The formal nature of the agreements therefore has benefits in certain circumstances. According to a Commission official they provide a stronger framework regarding what is allowed and not allowed which reassures competition agencies, and they create a certain dynamic, in particular with newer agencies that feel restricted in their liberty to communicate. Cooperation agreements are not only important on a case-level, but also in remaining a relevant player and in establishing credibility towards companies. The fact that the provisions are inherently unenforceable form an assurance against abuse according to the official. Flexible provisions ensure that there are no obligations to hold meetings or to consider the other's interests or to respond positively to a positive comity request to partners that are important to cooperate with, but not entirely reliable.¹⁹²⁶

Substantively, the EU's current first generation agreements do not restrict in any way the discretion of competition authorities in deciding whether or not to cooperate, which does not contribute to a predictable business environment for international corporations and severely limits the impact of the agreements. Obligations are formulated in terms of reasonable or best endeavours, a responsibility to motivate decisions is lacking, and the agreements are limited to generalities. It is telling that in the *Sun/Oracle* case for example,¹⁹²⁷ the annual bilateral conversations between the US and the EU were cancelled by the DoJ in November 2009 three days before they were supposed to take place,¹⁹²⁸ to display irritation at the EU for opening a second phase inquire into the *Sun/Oracle* transaction. Earlier, in October 2001, the US DoJ publicly scolded the EU for its treatment of the *GE/Honeywell* deal at the occasion of the opening of the OECD's first Global Forum on Competition.¹⁹²⁹ This

¹⁹²⁵ S. Hataway, "Interview of Antonio Capobianco in the framework of the conference 'Crossing merger control frontiers: what are the new borders?'" , *Concurrences Review*, 28 September 2015, <http://us7.campaign-archive2.com/?u=f48c739bee8a60152edc27c50&id=7c1280b87d&e=5adbabdbbc5> (accessed September 2015).

¹⁹²⁶ Interview with Commission official.

¹⁹²⁷ Commission Decision declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement, Case No COMP/M.5529 - Oracle/ Sun Microsystems, C(2010) 142 final, 21 January 2010.

¹⁹²⁸ "Crossing Merger Control Frontiers: What are the new borders?", 3rd Annual conference organized by Concurrences and Paul Hastings, Paris, 30 October 2015.

¹⁹²⁹ W.E. Kovacic, "Nine next steps for transatlantic antitrust policy cooperation", *CPI Antitrust Chronicle*, Vol. 1, October 2011, 4.

should not be possible when a formal agreement is concluded committing both parties to cooperation, and is devastating for good relations between both authorities. It renders the conclusion of cooperation agreements entirely meaningless. The objective of conflict avoidance was therefore only marginally achieved. There is only conflict avoidance when no true conflict is present. If substantial analysis or policy objectives differ, the agreements do facilitate or stimulate reaching a mutually satisfactory solution. First generation agreements do not offer a proper forum to address disputes when these actually arise.¹⁹³⁰ Politicization cannot be overcome by these agreements as true commitment to cooperation is lacking. Trust and good personal relations can easily be destroyed if there is no institutional trust. Shallow commitments that do not entail any compromise of control but only allow cooperation to take place when it suits all sides is “*what one would expect from bureaucrats and regulators trying to protect their authority.*”¹⁹³¹ This is disappointing. International cooperation agreements should be ambitious in setting the standard.

Overall the benchmark-assessment yielded a rather poor result. Conflict avoidance could be increased if the agreements did not limit themselves to generalities, provided more concrete examples of cooperation, and expressed obligations in stronger terms, rather than excessively emphasizing the discretion of the parties. First generation agreements do not create substantial rationalisation of resources or added efficiencies. Little deference occurs, and information exchange is too limited to have a significant impact on the parties’ budget. Formalising existing practice does add to the transparency of the process and in that manner the agreements can be applauded. As parallel enforcement is not per se diminished, the procedural burden for undertakings under investigation has not been significantly reduced. Coordination between authorities does result in certain simplifications, but first generation agreements could do more to encourage such cooperation. New agreements could be supplemented with an annex focusing on positive examples of cooperation, and more details on how to implement the provisions. Currently, while agreements often call on states to take into consideration the impact of anticompetitive conduct on the other party, it is not explained how this sort of consideration should be carried out and no real discussion of how foreign interests should be weighed against domestic ones.¹⁹³² Moreover, additional emphasis could be put on the commitment to align timing to the extent allowed within the domestic framework. First generation agreements should dare to be more ambitious in scope, and not be restricted to minimally coordinating parallel procedures. If first generation agreements are to play a role in the future, more empirical information on their implementation is crucial, and currently largely missing. Reporting that cooperation took place without detailing how cooperation ensued and how extensive it was is of little use.¹⁹³³ Transparency is crucial. If the counterargument is that reporting obligations would add to the administrative burden, it is still more productive to research one less cartel case, and be more open about the ones that were investigated, as the resulting trust in the process would generate significant return-on-investment. Implementation of the agreements should be publicised more widely and more thoroughly, for instance when considerations of comity have played a role, even informally. This would also provide guidance to the judiciary and lawyers, that currently do not take cooperation agreements into account in any way.

¹⁹³⁰ M. Dabbah, “Future directions in bilateral cooperation: A policy perspective”, in A. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 293.

¹⁹³¹ A. Guzman, “International Competition Law” in A. Guzman & A. Sykes (eds), *Research Handbook in International Economic Law*, Cheltenham, Edward Elgar Publishing, 2007, 427.

¹⁹³² Ibid.

¹⁹³³ M. Dabbah, “Future directions in bilateral cooperation: A policy perspective” in A. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 294.

With regard to second generation agreements, the OECD/ICN Joint Survey established that an effective legal framework for the exchange of confidential information should remove all doubt on the types of information that can and cannot be exchanged, and under what conditions. Also the allowed use of exchanged information should be clear.¹⁹³⁴ It was demonstrated above that on all three accounts the EU's first 'second generation agreement' falls short in terms of transparency as well as installing 'cooperation discipline' in the process. Examples of the remaining opacity include the uncertainty revolving around the exchange of information originating from a failed settlement attempt, the scope of data protection, and the application of privileges. Despite the safeguards present in the Agreement, it is difficult to predict what will happen with information once it is exchanged.¹⁹³⁵ The level of commitment is too low. At a minimum, the legitimate reasons for refusal to cooperate should be listed, and a motivation should be required. The margin of discretion left to the parties in deciding whether and to what extent to cooperate, in the presence of several rather strict safeguards, is too wide. While cooperation should not be forced and requires a case-by-case assessment, it would, however, be desirable to develop stronger language expressing a firm commitment to international cooperation. The European Parliament expressed its disappointment in this regard, that *"the agreement does not establish binding obligations as regards cooperation and leaves a broad margin for discretion, in particular by virtue of the reference to 'important interests', which can be invoked by either party as a justification for not complying with a request made by the other party."*¹⁹³⁶ Considering the wide range of business activities affected by competition law, the credibility of hard commitments is preferred.¹⁹³⁷

While some concerns towards the exchange of confidential information are generated more by perception than by reality, others are justified, and current second generation agreements failed to tackle some of these pressing issues. Second generation agreements do not provide a clear definition of confidential information. Confidentiality rules are often dispersed and opaque, so transparency on the concept in international cooperation agreements is crucial. It is important that a correct balance is struck between the principle of openness and the fundamental rights of the companies. The EU-Switzerland Agreement does not sufficiently address due process, and compared to other fields of international legal cooperation they lack a strong binding structure. Little inspiration seems to have been taken from other areas of law where more advanced cooperation is taking place. Overly restrictive safeguards impede international cooperation from truly moving forward. The risk of leaking or misusing exchanged information is not bigger than in other legal contexts, and the fear of an exponential rise in subsequent private actions in a foreign jurisdiction based on this information is not entirely grounded. The functioning of the leniency programme is protected to a large extent, but as mentioned, it is questionable whether leniency programmes deserve to be treated as the holy grail. There is an apparent discord between the issues deserving to be addressed and the issues actually

¹⁹³⁴ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 16.

¹⁹³⁵ Concluding their study on international cooperation provisions, HOLMES et.al. remarked that *"interesting as the texts are, one cannot easily predict how they will be operated. Even agreements focussing solely or primarily on cooperation as such, essentially allow cooperation rather than require it. There are certain cases in which there is stated obligation that one party 'shall notify' certain matters, but in the absence of any binding dispute settlement it is hard to know what this implies."* (P. Holmes, H. Müller, A. Papadopoulos, & A. Sydorak, "A Taxonomy of International Competition Cooperation Provisions", paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 63).

¹⁹³⁶ European Parliament Resolution on EU Cooperation Agreements on Competition Policy Enforcement – The Way Forward, 2013/2921(RSP), 5 February 2014, paragraph 3.

¹⁹³⁷ J. Wayland, "International cooperation at the antitrust division", remarks as prepared for the International Bar Association's 16th Annual Competition Conference, Florence, 14 September 2012, 9.

addressed in the Agreement. More attention should go to the exchange of non-evidence as well, in particular as concerns so-called ‘agency information’.

The EU had the opportunity to annihilate many of the concerns revolving around the controversial issue of information exchange among enforcers by developing a clear and transparent model-agreement, containing appropriate safeguards. It could take the lead by modernising the approach in the US-Australia second generation Agreement, which is barely used. The Agreement sadly remains cloudy on some important issues and it is regrettable that investigatory assistance was excluded from its scope, as valid reasons to do so are not apparent. The criticism in this study by no means aims to diminish the importance of the EU-Switzerland Agreement, but rather serves as an encouragement to broaden the reading of Article 15 TFEU, which states that all EU institutions, bodies, offices or agencies should ensure the transparency of their proceedings and should foresee specific provisions regarding access to its documents in their Rules of Procedure. This transparency requirement should also be present in the event procedural rights of parties are influenced by international agreements concluded by the EU or one of its agencies. Rather than necessitating additional clarification in complex and disperse rules of procedure, international enforcement cooperation agreements should provide sufficient information in the text of the agreement itself, and sufficient guidance as to their practical application. The aforementioned challenges should not form an argument against the sharing of confidential information, or a reason to minimize or overly constrain it. They rather make a case for clearer rules, thereby creating more certainty and predictability for competition agencies, businesses and governments alike. If not, the EU’s second generation agreement risks to remain un(der)used, as happened with the US’ second generation agreement.

The importance of second generation agreements is even more highlighted when looking at the alternatives and complements that are available. Waivers are complex instruments and the goodwill of the parties is required. They can still lead to suboptimal communication and are subject to strategic use. Unilateral gateway provisions appear useful, but they lack transparency and their use is burdensome. Mutual recognition and lead jurisdiction mechanisms have many hurdles to overcome and are unrealistic options at the moment. Multilateral forums should not only mention other policy fields in which advanced cooperation takes place, but analyse in depth the feasibility of transposing such cooperation-mechanisms to a competition law context and which challenges this would entail. From international cooperation in tax policy for instance, inspiration can be drawn from the upward pressure that is created on voluntary global standards. The ‘multi-speed adoption’ of standards that allows countries that wish to take on more commitments to do so, and the peer pressure that is created by publishing lists of compliant and non-compliant countries could also become standard practice in the field of competition law enforcement cooperation. The novel way of concluding agreements, the detailed commentaries that are available to the implementing parties, the possibility of advanced investigatory support, and the emphasis on clear definitions are other examples of mechanisms that could benefit international cooperation in the field of competition law and policy. Tax authorities can also rely on information from other authorities, an area that is underregulated with regard to competition authorities. Remarkable as well is that in international tax policy cooperation the interplay between the multilateral and bilateral spheres is much more intense and mutually reinforcing. From MLATs the stronger commitment to cooperation and the stricter conditions for refusal may serve as an inspiration. A difference appears to be that in both tax and criminal law enforcement cooperation, the cooperation mechanisms seem to be more purposefully designed, whereas in competition law enforcement international cooperation was generated by

pressing needs.¹⁹³⁸ This may relate to the perception that cooperation in tax or criminal matters delivers more direct results for the country concerned, and countries are therefore more motivated to cooperate internationally.

This part of the study was opened by the following quote: *“The basic prerequisite for any international cooperation in competition cases is the exchange of information and evidence between the national competition authorities. This lies at the centre of any efficient cooperation, and the level of its implementation may impede or enhance the activities of such authorities.”*¹⁹³⁹ While the complexities of international cooperation should not be underestimated, and information exchange rightly takes on a central role, caution is in place for a lack of ambition. Information exchange should be understood as more than the mere transmission of documents and intelligence among case-teams, which currently seems to be the case. It also encompasses the training of the judiciary in dealing with international competition matters, advocacy towards the public, or more broad investigatory assistance. Currently cooperation agreements improve channels of communication between regulators, lower the cost of obtaining information to a certain extent, and provide guidelines on how enforcers from different jurisdictions can interact. They should, however, not be limited to this function. Currently, there is not a single compromise of domestic control over enforcement.¹⁹⁴⁰ Enforcement cooperation should not only focus on how to accommodate parallel unilateral enforcement, but also actively try to limit such enforcement. The level of cooperation among competition authorities generated over a relatively short period of time is impressive.¹⁹⁴¹ The amount of wisdom increased tremendously, but caution is in place for a standstill. Often, international cooperation amounts to *“little more than an illusory promise of assistance when it is in the assisting nation’s interests to do so.”*¹⁹⁴² If states refrain from applying their laws extraterritorially, more often than not such a decision is motivated by the pragmatic reason that a state lacks the power to enforce its laws abroad or the capacity to pursue that particular case, rather than comity considerations.¹⁹⁴³ GUZMAN’s statement that *“there is little indication that existing cooperation represents an effort to construct a sensible international approach to competition issues or address the ways in which domestic laws interact”* is confirmed by the analysis in this study.¹⁹⁴⁴ First and second generation agreements allow cooperation rather than installing a certain discipline in the cooperation process. While strong *personal* relationships have been developed among the personnel of for instance the US and the EU antitrust authorities, due to frequent interaction on cases as well as during conferences or bar association events,¹⁹⁴⁵ even among such similarly advanced systems *institutional* trust is often still lacking. Cooperation agreements ought to play a larger role in strengthening such trust. This can be done via stronger commitments, and more transparency in the application of such agreements. Bilateral

¹⁹³⁸ “Crossing Merger Control Frontiers: What are the new borders?”, 3rd Annual conference organized by Concurrences and Paul Hastings, Paris, 30 October 2015.

¹⁹³⁹ M. Błachucki & S. Józwiak, “Exchange of information and evidence between competition authorities and entrepreneurs’ rights”, *Yearbook of Antitrust and Regulatory Studies*, Vol. 5, No. 6, 2012, 139.

¹⁹⁴⁰ A. Guzman, “International competition law” in A. Guzman & A. Sykes (eds), *Research handbook in international economic law*, Cheltenham, Edward Elgar Publishing, 2007, 426.

¹⁹⁴¹ “Crossing Merger Control Frontiers: What are the new borders?”, 3rd Annual conference organized by Concurrences and Paul Hastings, Paris, 30 October 2015.

¹⁹⁴² S.W. Waller, “The Internalization of Antitrust Enforcement”, *Boston University Law Review*, Vol. 77, No. 2, 1997, 376 as cited in M. Chowdhury, “From Paper Promises to Concrete Commitments: Dismantling the Obstacles to Transatlantic Cooperation in Cartel Enforcement”, American Antitrust Institute Working Paper No. 11-09, 28 November 2011, 4.

¹⁹⁴³ A. Guzman, “International competition law” in A. Guzman & A. Sykes (eds), *Research handbook in international economic law*, Cheltenham, Edward Elgar Publishing, 2007, 435.

¹⁹⁴⁴ *Ibid.*, 427.

¹⁹⁴⁵ D. Klawiter and C. Laciak, “International Competition Cooperation: No Longer Just the Formal Agreements”, *The Antitrust Review of the Americas, A Global Competition Review Special Report*, 2003, 24.

agreements should be living agreements forming advanced hubs for experimentation. KOVACIC rightly underlined that it are the older and wealthier jurisdictions that must lead experimentation efforts in favour of less mature agencies, because they have more room to make capital investment in policy research, development, and promotion. Experienced agencies should be encouraged to further invest in infrastructures and policy platforms leading to proper enforcement.¹⁹⁴⁶ Bilateral agreements can serve as examples of successful cooperation and can take away reservations that may exist when certain ideas are pushed multilaterally.¹⁹⁴⁷ While MARSDEN considered that regular interaction between competition officials is more valuable than the conclusion of treaties,¹⁹⁴⁸ one can wonder whether the process is truly the product. The conclusion of agreements leads to legitimacy, anchors due process considerations, and creates foreseeability. The cooperation process must be trusted by all parties for it to work, and agreements can provide the transparency to generate that trust.

Apart from the design of the cooperation instruments, goodwill must be in place by the parties signing a cooperation agreement. Such goodwill should be generated in multilateral forums (see below, Part III, 2.2.1.1, B). HOLMES *et al.* found in 2005 that information exchange by DG COMP with close partners had been scarce, but only Turkey found this to indicate lack of goodwill by the EU.¹⁹⁴⁹ One competition official, when asked what in his view was the biggest achievement in international competition law enforcement cooperation up to date, answered that today the agreements are actually applied, in contrast to when they were concluded, indicating that a change in mentality has taken place.¹⁹⁵⁰ Considering the effort it took to implement the rather weak obligations in the EU's bilateral agreements, it is clear that more work remains to be done.

¹⁹⁴⁶ W. E. Kovacic, Closing keynote speech, "Crossing Merger Control Frontiers: What are the new borders?", 3rd Annual conference organized by Concurrences and Paul Hastings, Paris, 30 October 2015: Brochure.

¹⁹⁴⁷ "Crossing Merger Control Frontiers: What are the new borders?", 3rd Annual conference organized by Concurrences and Paul Hastings, Paris, 30 October 2015.

¹⁹⁴⁸ "[m]eetings and rule-making feed each other in a virtuous circle: meetings lead to understandings, which can lead to agreement and treaties; and treaties set out a structure on which further meetings, cooperation and developments can build." P. Marsden, "'Jaw-jaw' not 'law-law' – from treaties to meetings: the increasing informality and effectiveness of international cooperation" in A. Ezrachi (ed.), *Research Handbook on International Competition*, Cheltenham, Edward Elgar Publishing, 2012, 110-111

¹⁹⁴⁹ P. Holmes, H. Müller, A. Papadopoulos, & A. Sydorak, "A Taxonomy of International Competition Cooperation Provisions", paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 63.

¹⁹⁵⁰ Interview with Commission official.

PART III: Dedicated agreements versus integration in a broader framework

“The best practice in competition policy is the relentless pursuit of better practices.”¹⁹⁵¹

Many instruments are available for DG COMP to cooperate internationally to enforce the EU’s competition laws more effectively. This study has so far focused on cooperation via bilateral dedicated cooperation agreements. As mentioned however, in the past, the EU has continuously promoted competition law within the multilateral context of the WTO.¹⁹⁵² After the demise of this endeavour, it has included competition provisions in a wide array of bilateral trade agreements. The first section of this part will analyse competition chapters in FTAs to see whether they represent an added value or valid substitute compared to dedicated bilateral cooperation agreements. The second section of this part will look at the multilateral forums in which the EU is engaged that deal with competition law and policy, and will analyse how the multilateral track can complement and enhance bilateralism. This part therefore contrasts the ‘dedicated’ approach, focussing solely on competition, to a more ‘integrated’ approach, both substantively as geographically.

1. Substantive integration: competition in the global trade system – a cautionary tale

1.1 Relevance and scope

An analysis of competition provisions in the EU’s free trade agreements is relevant, first, because DG COMP’s management plans indicate a significant rise in FTAs including competition provisions. The prospectuses in the management plans for 2012–2014 indicated an increase from thirty-one to fifty FTAs containing competition and/or state aid clauses.¹⁹⁵³ DG COMP’s 2016 Management Plan further revealed a target of 34 new competition cooperation agreements and free trade agreements containing competition and State aid clauses in 2019 compared to the baseline of 20 in 2014.¹⁹⁵⁴ Furthermore, the EU’s policy of linking trade and competition is typically presented as one of the most striking examples of its deep trade agenda. So-called ‘behind the border’ issues are no longer

¹⁹⁵¹ W. E. Kovacic, “Achieving Better Practices in the Design of Competition Policy Institutions”, remarks before the Seoul Competition Forum, 20 April 2004.

¹⁹⁵² European Commission, Towards an international framework of competition rules, Communication to the Council, COM(96)284 final, 18 June 1996; K. van Miert, “International Cooperation in the Field of Competition: a view from the EC”, in Hawk, Barry (ed.), 1997 *Fordham Corporate Law Institute International Antitrust Law and Policy Conference*, New York, Fordham Corporate Law Institute, 1998.

¹⁹⁵³ DG Competition Management Plan 2012, available at http://ec.europa.eu/atwork/synthesis/amp/doc/comp_mp.pdf (accessed August 2014), 37; DG Competition Management Plan 2013, available at http://ec.europa.eu/competition/publications/annual_management_plan/amp_2013_en.pdf (accessed June 2017), 38; DG Competition Management Plan 2014, available at http://ec.europa.eu/competition/publications/annual_management_plan/amp_2014_en.pdf (accessed August 2014), 45–46. The increase in FTAs has been nuanced in the Management Plan for 2014, indicating an increase in the medium term from three (2013) to nine free trade agreements containing competition/state aid clauses with third countries. The total number of third countries with whom the EU has negotiated or is negotiating trade agreements containing competition/state aid clauses rose from 33 in 2013 to 39. Interestingly, the number of contributions to OECD, ICN and UNCTAD is foreseen to diminish in the future, from 27 in 2013 to an average of 15 to 20 in the medium term.

¹⁹⁵⁴ See http://ec.europa.eu/atwork/synthesis/amp/doc/comp_mp_2016_en.pdf (accessed July 2017), 39.

solely a matter for domestic regulators.¹⁹⁵⁵ Like national competition laws in general, competition provisions in FTAs have undergone a surge in popularity in a relatively limited amount of time.¹⁹⁵⁶

This section does not aim to provide a typology of the competition provisions in the EU's FTAs. This has already been done on a much larger scale, by both academics and international organisations.¹⁹⁵⁷ The OECD, for instance, has categorised the competition policy provisions in 86 trade agreements dating from the period 2001-July 2005.¹⁹⁵⁸ This study is considered to be the first attempt to systematically take stock of competition provisions in a significant sample of FTAs.¹⁹⁵⁹ It had earlier issued another study containing a qualitative assessment of competition policy provisions of FTAs,¹⁹⁶⁰ as did UNCTAD.¹⁹⁶¹ As the goal is not to develop a taxonomy or template of competition provisions in EU FTAs, the sample of agreements under scrutiny is relatively limited.

What this section will do is assess the value of competition provisions in FTAs and thereby evaluate whether this 'integration' is to be applauded or not. The evolution of the global trade system, and in particular the place of competition law within this system, is complex and uncertain. This section aims to contribute to the debate on whether, and if so, how, competition regulation should fit into the global trade scheme, again from an EU perspective. It will do so by first looking at the emergence of competition chapters in FTAs in general. Then it will map out the alleged evolution of EU FTAs, from 'traditional' ones, over post-Global-Europe FTAs to mega-FTAs. Then several arguments favouring and opposing inclusion of competition provisions in FTAs will be identified and weighed against each other, in order to reach a conclusion as to the desirability of such provisions in FTAs.

This section comes with the disclaimer that the analysis is limited to specific competition policy chapters in FTAs and does not touch on those chapters which may have incidental effects on competition policy. The aforementioned OECD study was criticised for focusing exclusively on competition chapters, as sector-specific chapters as well may contain competition policy provisions that may even go beyond the provisions foreseen in the competition policy chapter. It is indeed

¹⁹⁵⁵ C. Damro, "The new trade politics and EU competition policy: shopping for convergence and co-operation", *Journal of European Public Policy*, Vol. 13, No. 6, September 2006, 868.

¹⁹⁵⁶ Bhagwati, as referred to by J. Rennie, "Competition regulation in SAFTA, AUSFTA and TAFTA: a spaghetti bowl of competition provisions?", *International Trade Law & Regulation*, Vol. 13, No. 2, 2007, 32.

¹⁹⁵⁷ Even if somewhat dated, see, for instance, S. J. Evenett, "What can we really learn from the competition provisions of regional trade agreements?", 23 August 2005, available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.583.9612&rep=rep1&type=pdf> (accessed February 2017), 1; J. Bourgeois, K. Dawar & S. J. Evenett, "A comparative analysis of selected provisions in free trade agreements", Commissioned by DG TRADE, October 2007, <http://www.kamaladawar.com/userfiles/file/downloads/A%20Comparative%20Analysis%20of%20Selected%20FTAs.pdf> (accessed February 2017), 190-191.

¹⁹⁵⁸ See O. Solano & A. Sennkamp, "Competition Provisions in Regional Trade Agreements", OECD Trade Policy Working Paper Series, Paper No. 31, 2006, COM/DAF/TD(2005)3/FINAL, 7-9.

¹⁹⁵⁹ A. Bradford & T. Büthe, "Competition policy and free trade – Antitrust provisions in PTAs" in A. Dür, M. Elsig (eds), *Trade cooperation – the purpose, design and effects of preferential trade agreements*, Cambridge, Cambridge University Press, 2015, 249.

¹⁹⁶⁰ See OECD, *The Relationship Between Regional Trade Agreements and the Multilateral Trading System: Competition*, TD/TC/WP(2002)19/FINAL, 7 May 2002.

¹⁹⁶¹ See UNCTAD, *A Presentation of Types of Common Provisions to be Found in International, Particularly Bilateral and Regional, Cooperation Agreements on Competition Policy and their Application*, TD/RBP/CONF.6/3, 6 September 2005, as referred to by D. D. Sokol, "Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements", *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 253.

confirmed that important competition provisions frequently appear outside a designated competition policy chapter,¹⁹⁶² this would however lead this study too far. Furthermore, any other limitation would be equally artificial, as many provisions in a trade agreement indirectly contribute to increasing competition and stimulating the competitive process. One particular aspect that will not be examined as it would detract too far from the main intention of this study is the relationship between anti-dumping provisions and competition law. Anti-dumping laws are often central when discussing the relationship between trade and competition and the inclusion of competition laws in to the WTO, as anti-dumping laws are the most obvious example of governmental trade measures allowed by WTO law, but detrimental to international competition.¹⁹⁶³ Both anti-dumping and competition law aim to address the same market distortion, namely predatory price discrimination by producers between different markets and/or customers, from an external and internal, domestic point of view respectively. It should be noted, however, that trade defence measures mainly aim to protect producers, and not consumers.¹⁹⁶⁴ Anti-dumping statutes promote competitor welfare rather than consumer welfare, and in this sense are in tension with antitrust.¹⁹⁶⁵ It has been stated that the imposition of anti-dumping duties reduces competition within the Union.¹⁹⁶⁶ Due to the fact that an increasing number of WTO members include competition provisions in their FTAs, the latter “*could thus become a possible avenue for negotiating the interaction between trade defenses and competition laws.*”¹⁹⁶⁷ Currently, only a small minority of the abundance of FTAs, such as the European Economic Area, ANZCERTA, EFTA- Chile, EFTA-Singapore, and Canada-Chile, preclude the parties from resorting to trade defences or replace them with competition provisions as the latter are believed to address the economic causes that lead to trade defences.¹⁹⁶⁸ TAYLOR, however, comes to the conclusion that the substitution of anti-dumping law with competition law has clear advantages, but there are significant preconditions for doing so successfully.¹⁹⁶⁹

It should nevertheless be added that as with dedicated competition agreements, it is difficult to assess the value of competition chapters in FTAs, as little is known of their effect. It is generally claimed that competition chapters fulfil an important role in FTAs because they link antitrust with trade liberalization. SOKOL rightly second guessed this conventional wisdom, however, claiming that “*until now, the effectiveness of antitrust and competition policy chapters has remained unanswered.*”¹⁹⁷⁰ Even if the effects of the provisions are measurable as such, it is difficult to know whether or to what extent the success

¹⁹⁶² A. Bradford & T. Büthe, “Competition policy and free trade – Antitrust provisions in PTAs” in A. Dür, M. Elsig (eds), *Trade cooperation – the purpose, design and effects of preferential trade agreements*, Cambridge, Cambridge University Press, 2015, 250.

¹⁹⁶³ M. Taylor, *International competition law – A new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 260.

¹⁹⁶⁴ F.-C. Laprévotte, “Antitrust in wonderland: trade defense through the competition looking glass”, *Concurrences*, N 2° - 2015 (in *Concurrences*, Competition Law Review, English Edition 2016), 67-68.

¹⁹⁶⁵ D. D. Sokol, “Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements”, *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 277.

¹⁹⁶⁶ F.-C. Laprévotte, “Antitrust in wonderland: trade defense through the competition looking glass”, *Concurrences*, N 2° - 2015 (in *Concurrences*, Competition Law Review, English Edition 2016), 69.

¹⁹⁶⁷ *Ibid.*, 82.

¹⁹⁶⁸ For further analysis, see *Ibid.*

¹⁹⁶⁹ See M. Taylor, *International competition law – A new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 260.

¹⁹⁷⁰ D. D. Sokol, “Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements”, *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 233.

of a provision is due to the characteristics of the signatories, the circumstances surrounding the agreement, or the provision itself.¹⁹⁷¹

1.2 Emergence of competition chapters in FTAs

1.2.1 Link between trade and competition

As mentioned, the effect of globalization on competition is twofold. On the one hand, it intensifies competition as markets that were once protected become accessible; on the other hand, it jeopardizes competition as it fosters anti-competitive behaviour on a large scale.¹⁹⁷² Competition laws therefore needed to supplement trade liberalization in order to protect its positive effects. The main purpose of introducing competition law provisions in international trade instruments is to make sure that the removal of state-made tariff and non-tariff barriers to trade are not replaced by barriers erected by private economic operators, in particular in the absence of international rules on competition applied on a non-discriminatory basis. It thereby aggrandises the benefits of such trade liberalization by ensuring a regulatory environment that fosters economic efficiency and consumer welfare.¹⁹⁷³ In the EU competition provisions were instrumental to achieve efficient market integration, again illustrating the international trade origins of competition policy.¹⁹⁷⁴

Already since the 1920s attempts had been undertaken to embed competition issues in a trade context, such as the World Economic Conference of the League of Nations, the Havana Charter, and the ECOSOC initiative. The idea behind such ‘integrated’ initiatives was generally to revive global trade and stabilize global economic relations by addressing public as well as private restraints. However, all these multilateral attempts have failed to establish binding norms, because they were overly ambitious, because there was a lack of consensus on fundamental issues, or due to circumstances unrelated to the content of the agreement, such as parallel negotiations taking away the sense of urgency or even the outbreak of WWII. The US moreover consistently and paradoxically played the role of both initiator and destructor of many of these initiatives and the political nature of competition and trade negotiations quickly rose to the surface (see above, Part I, 3).

The link between trade and competition has only increased, due to the so-called ‘global value chain’.¹⁹⁷⁵ The new international trade environment is characterised by the fact that trade policy has

¹⁹⁷¹ S. J. Evenett, “What can we really learn from the competition provisions of regional trade agreements?”, 23 August 2005, available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.583.9612&rep=rep1&type=pdf> (accessed February 2017), 47; P. Brusick, A. M. Alvarez & L. Cernat (eds), *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*, United Nations Publication, 2005, 138-139.

¹⁹⁷² H. Klodt, *Towards a Global Competition Order*, Berlin, Liberal Verlag GmbH, 2005, 9. The two main forms of international anti-competitive behaviour are international cartels and anti-competitive global mergers. Other types of anti-competitive practices have cross-border effects as well. These include domestic export cartels with impact on importing countries, vertical market restraints (excluding foreign firms from distribution networks), abuses of dominant positions, and state aid.

¹⁹⁷³ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 179-181, 199.

¹⁹⁷⁴ A. Heimler, “EU Foreign policy tools/Competition policy”, in F. Bindi (ed.), *The foreign policy of the European Union – Assessing Europe’s role in the world*, 1st ed., Massachusetts, Brookings Institution Press, 2010, 95.

¹⁹⁷⁵ See, for instance, G. Gereffi, J. Humphrey & T. Sturgeon, “The governance of global value chains”, *Review of International Political Economy*, Vol. 12, No. 1, 2005; G. Gereffi, & K. Fernandez-Stark, “Global value chain analysis: a primer”, 2nd ed., July 2016, available at http://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/12488/2016-07-28_GVC%20Primer%202016_2nd%20edition.pdf?sequence=1 (accessed February 2017).

lost a large part of its autonomy, as “international trade is now intrinsically part of the different stages of the conception, creation, and exchanging phases of the production processes.”¹⁹⁷⁶ Classic trade liberalisation in the form of dismantling tariffs and other border barriers is gradually losing importance to so-called behind-the-border issues, where barriers to trade are present inside the national markets of the respective countries.¹⁹⁷⁷

1.2.2 WTO demise and moratorium

During the 1990s, the EU was a fervent advocate and the main proponent of a multilateral competition policy initiative using the binding framework of the WTO.¹⁹⁷⁸ The European Commission’s proposal was picked up by the WTO during its 1996 ministerial meeting in Singapore and a working group was created to study the interaction between trade and competition policy, driven by a wish for greater coherence between those policies.¹⁹⁷⁹ The EU’s advocating efforts failed, however, with the collapse of negotiations in 2003 at the Cancun Ministerial Conference due to lack of agreement on the negotiation-modalities.¹⁹⁸⁰ The US was one of the main critics of the proposal, fuelled by a confidence in convergence towards the US standard. Its main argument was that the quid pro quo nature of the WTO would lead to a race to the bottom. A second group of opposition was formed by the developing countries. They feared that the regulatory cost demanded by the imposed changes would be too high, and the assistance and flexibility offered was not considered sufficient. Criticism did not only come from within, but also from external voices. For instance, the WTO’s lack of openness and accountability as well as its heavy bureaucratic nature allegedly made the venue less attractive for a multilateral agreement that included competition issues.¹⁹⁸¹ Another factor that may have contributed to the failure was that of timing. Stronger players in the competition field in particular may have been convinced that if they waited with the conclusion of an international agreement on competition law, this would be more favourable to them, believing that convergence towards their own system would take place over time (see above, Part I, 3.3.3).¹⁹⁸²

The EU imposed on itself an informal, de facto, moratorium from 1999 until 2006, based on a consensus of the Member States and the Commission, regarding the negotiation of preferential trade agreements during the preparations for the so-called ‘Millennium Round’ of the WTO and to focus attention on the negotiations in the Doha Development Round.¹⁹⁸³ It thereby aimed to show its priorities in international trade and organised its resources accordingly.¹⁹⁸⁴ In 2006, however, taking into account the stalemate in the WTO negotiations and given the pressure of the business

¹⁹⁷⁶ H. Paemen, “A new trade policy” in D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae Civis – Liber Amicorum Jacques Steenbergen*, Gent, Larcier, 2014, 139.

¹⁹⁷⁷ H. Klodt, *Towards a Global Competition Order*, Berlin, Liberal Verlag GmbH, 2005, 67.

¹⁹⁷⁸ U. Aydin, *Promoting Competition: European Union and the Global Competition Order*, paper prepared for presentation at the European Union Studies Association 11th Biennial International Conference, Los Angeles California, 23-25 April 2009.

¹⁹⁷⁹ The other two working groups established during that meeting dealt with government procurement, and the relationship between trade and investment. P. Gallagher, *The First Ten Years of the WTO 1995-2005*, Cambridge, Cambridge University Press, 2005, 37-39.

¹⁹⁸⁰ See http://www.wto.org/english/tratop_e/comp_e/history_e.htm#doha (accessed December 2013).

¹⁹⁸¹ P. Gallagher, *The First Ten Years of the WTO 1995-2005*, Cambridge, Cambridge University Press, 2005, 126-127.

¹⁹⁸² E. Elhauge & D. Geradin, *Global Competition Law and Economics*, 2nd ed., Oxford and Portland Oregon, Hart Publishing, 2011, 1246.

¹⁹⁸³ S. Woolcock, “European Union policy towards Free Trade Agreements”, ECIPE Working paper no. 03/2007, 2.

¹⁹⁸⁴ H. Paemen, “A new trade policy” in D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae Civis – Liber Amicorum Jacques Steenbergen*, Gent, Larcier, 2014, 137.

community,¹⁹⁸⁵ as well bilateral initiatives taken by other major trading nations, the Commission published its Global Europe communication,¹⁹⁸⁶ presenting a strategy to respond to the challenges faced by the EU in a rapidly globalizing economy.

1.2.3 Rise of bilateral FTAs

1.2.3.1 Global Europe

In this Global Europe communication, that remains dedicated in the first place to the Doha development Agenda in achieving an ambitious, balanced and just agreement to liberalise world trade,¹⁹⁸⁷ the Commission nevertheless emphasised the need for more international cooperation and for greater convergence in the competition area as it announced its intention to include stronger provisions on competition in a new generation of FTAs, which are “*comprehensive and ambitious in coverage, aiming at the highest degree of trade liberalisation including far-reaching liberalisation of services and investment.*”¹⁹⁸⁸ In the accompanying staff working documents it was further explained that the Commission aimed to review the competition chapters of future FTAs in view of promoting greater convergence of competition laws and enforcement and ensuring that trade partners refrain from protecting their firms from international competition. The global competition challenge was mentioned first among the opportunities of globalisation.¹⁹⁸⁹ This has led to the conclusion of so-called Deep and Comprehensive Free Trade Agreements (DCFTAs). The term ‘deep and comprehensive’ was first coined in a Commission Communication to the Council and the European Parliament on Strengthening the European Neighbourhood Policy,¹⁹⁹⁰ but later became used more broadly. According to the communication, a deep and comprehensive FTA should cover substantially all trade in goods and services and should include strong legally-binding provisions on trade and economic regulatory issues and should be tailored and sequenced carefully to take account of the economic circumstances and state of development of each partner country. In the context of the ENP, the ultimate objective is to create a common regulatory basis and similar degree of market access among partners. Even though focus is on a bilateral approach in this regard, the Commission

¹⁹⁸⁵ R. Ahearn, “Europe’s Preferential Trade Agreements: Status, Content, and Implications”, CRS Report for Congress, 3 March 2011, 2, footnote 9.

¹⁹⁸⁶ Communication from the Commission, “Global Europe: Competing in the world – A contribution to the EU’s Growth and Jobs Strategy”, COM (2006) 567 final, 4 October 2006.

¹⁹⁸⁷ Commission Staff Working Document, Annex to the Communication from the Commission to the Council, the European Parliament, the European Economic and Social committee and the Committee of the Regions, “Global Europe: Competing in the World”, SEC(2006) 1230, 4 October 2006, 3, 15.

¹⁹⁸⁸ Communication from the Commission, “Global Europe: Competing in the world – A contribution to the EU’s Growth and Jobs Strategy”, COM (2006) 567 final, 4 October 2006, 9. Also see E. Valle Lagares, “International Agreements Regarding Cooperation in the Field of Competition: The New Strategy of the European Commission”, *Journal of European Competition Law & Practice*, Vol. 1, No. 2, 2010; B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 190.

¹⁹⁸⁹ Commission Staff Working Document, Annex to the Communication from the Commission to the Council, the European Parliament, the European Economic and Social committee and the Committee of the Regions, “Global Europe: Competing in the World”, SEC(2006) 1230, 4 October 2006, 4, 18.

¹⁹⁹⁰ Communication from the Commission to the Council and the European Parliament on strengthening the European neighbourhood policy, COM/2006/0726 final, 4 December 2006. In December 2011, the Council decided to negotiate Deep and Comprehensive Free Trade Agreements with Morocco, Jordan, Egypt and Tunisia. (See G. Van der Loo, “Mapping out the Scope and Contents of the DCFTAs with Tunisia and Morocco”, EuroMeSCo Series, March 2016.) Such agreements were also negotiated with Ukraine, Moldova, and Georgia, signed in 2014. The latter were a part of an overall new Association Agreement.

is careful to ensure that the concept remains fully consistent with the longer-term vision of an economic ENP community.¹⁹⁹¹

FTAs negotiated after the Global Europe communication were therefore intended to contain provisions that are deeper, wider, and more reciprocal than previous FTAs. The EU moreover wished to focus more on its main trade interests, for instance with Asia, rather than on its neighbourhood and development objectives that were already relatively well served, even if the content of those agreements ‘remain limited’ according to the Commission. The latter therefore wished to “*factor other issues and the wider role of trade policy in EU external relations into bilateral trade developments*”, in order to create jobs and drive growth.¹⁹⁹² For this to be possible economic factors had to play a primary role in the choice of future FTAs. This is often phrased in market access terms, and improving the business climate of future major trading partners.¹⁹⁹³ Indeed, partners with which DCFTAs would be concluded would be selected based on the economic criteria of market potential (economic size and growth) and the level of protection against EU export interests (tariffs and non-tariff barriers).¹⁹⁹⁴ Again the strategic aspect is emphasized, stating that negotiations of potential trading partners and priority targets with EU competitors should also be taken into account, in particular with regard to investment. These ‘competitiveness-driven’ FTAs were intended to be both comprehensive and ambitious in coverage.¹⁹⁹⁵ On the one hand, the ‘comprehensive’ dimension of a DCFTA referred to the fact that the latter agreement aimed to have a broad range, both covering all relevant trade(-related) areas as well as going beyond mere tariff-dismantling of trade in goods. The ‘deep’ dimension, on the other hand, referred to some more or less extensive form of integration into the EU Internal Market on the basis of legislative approximation.¹⁹⁹⁶

The expanded scope of ‘new’ trade agreements consists on the one hand of so-called ‘WTO plus’ provisions in the field of services, intellectual property rights or government procurement.¹⁹⁹⁷ WTO-plus provisions go beyond what the parties have already committed to at the multilateral WTO level. Furthermore, they contain commitments in policy areas not currently covered or regulated by WTO Agreements in a comprehensive way, so-called ‘WTO-extra’ provisions, for instance in the fields of investment, competition, environmental protection, labour laws, human rights, or movements of capital.¹⁹⁹⁸ Among these WTO-extra policy areas, competition is the main one covered by preferential

¹⁹⁹¹ Communication from the Commission to the Council and the European Parliament on strengthening the European neighbourhood policy, COM/2006/0726 final, 4 December 2006, 4-5.

¹⁹⁹² Commission Staff Working Document, Annex to the Communication from the Commission to the Council, the European Parliament, the European Economic and Social committee and the Committee of the Regions, “Global Europe: Competing in the World”, SEC(2006) 1230, 4 October 2006, 16.

¹⁹⁹³ Ibid.

¹⁹⁹⁴ G. Van der Loo, “Mapping out the Scope and Contents of the DCFTAs with Tunisia and Morocco”, EuroMeSCo Series, March 2016, 17.

¹⁹⁹⁵ Commission Staff Working Document, Annex to the Communication from the Commission to the Council, the European Parliament, the European Economic and Social committee and the Committee of the Regions, “Global Europe: Competing in the World”, SEC(2006) 1230, 4 October 2006, 14-17.

¹⁹⁹⁶ G. Van der Loo, “Mapping out the Scope and Contents of the DCFTAs with Tunisia and Morocco”, EuroMeSCo Series, March 2016, 17-18.

¹⁹⁹⁷ H. Tschaeni & V. Engammare, “The Relationship between Trade and Competition in Free Trade Agreements: Developments since the 1990s and Challenges”, *European Yearbook of International Economic Law*, Vol. 4, 2013, 39.

¹⁹⁹⁸ R. Ahearn, “Europe’s Preferential Trade Agreements: Status, Content, and Implications”, CRS Report for Congress, 3 March 2011, 14, 17.

trade agreements.¹⁹⁹⁹ The Global Europe communication is therefore seen as a dividing line in the EU's FTA-policy.

It was attempted to partially fill the gap created by the failure to include competition in a WTO context with competition chapters in FTAs, which have proliferated in recent years (see table below).²⁰⁰⁰ One third of EU trade is currently covered by regional trade agreements, if CETA and TTIP would be included in the calculation, this number would amount to two thirds.²⁰⁰¹ Already in 2010, over one hundred bilateral and regional trade agreements included provisions on competition law and policy.²⁰⁰² In 2012, about 80% of all existing regional trade agreements listed on the WTO website contained competition provisions.²⁰⁰³ Almost 75% of FTAs with competition elements are bilateral.²⁰⁰⁴

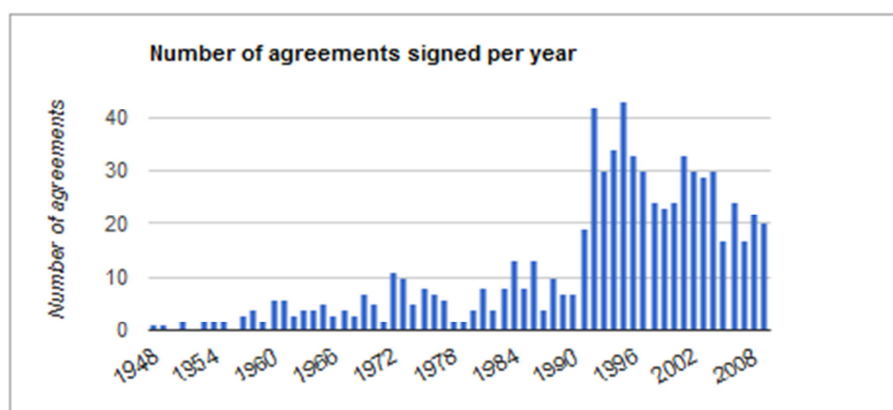


Figure 12. Source: <http://www.designoftradeagreements.org/> (accessed July 2017).

In the study of BRADFORD and BÜTHE 27,5% of their sample had a separate chapter devoted to competition law or policy. It was not required that the chapter had the word ‘competition’ in the title, but had to be substantively about competition law or policy. This percentage rose to 42,9% when asked whether the FTA simply contains separate articles substantively devoted to competition law or policy. A visual representation is offered below.²⁰⁰⁵

¹⁹⁹⁹ H. Tschaeni & V. Engammare, “The Relationship between Trade and Competition in Free Trade Agreements: Developments since the 1990s and Challenges”, *European Yearbook of International Economic Law*, Vol. 4, 2013, 39.

²⁰⁰⁰ R. Ahearn, “Europe’s Preferential Trade Agreements: Status, Content, and Implications”, CRS Report for Congress, 3 March 2011, 1.

²⁰⁰¹ “EU Common Commercial Policy in the Lisbon Era – Achievements and Prospects”, Policy seminar Global Governance Programme EUI, Fiesole, 16 October 2014.

²⁰⁰² J. Rennie, “Competition provisions in free trade agreements: unique responses to bilateral needs or derivative developments in international competition policy?”, *International Trade Law & Regulation*, Vol. 15, No. 2, 2009, 57.

²⁰⁰³ 98 out of 214 agreements. OECD Policy Roundtables: Improving International Co-operation in Cartel Investigations 2012, 31. Also see 38 in oecd survey report.

²⁰⁰⁴ J. Rennie, “Competition provisions in free trade agreements: unique responses to bilateral needs or derivative developments in international competition policy?”, *International Trade Law & Regulation*, Vol. 15, No. 2, 2009, 57.

²⁰⁰⁵ A. Bradford & T. Büthe, “Competition policy and free trade – Antitrust provisions in PTAs” in A. Dür, M. Elsig (eds), *Trade cooperation – the purpose, design and effects of preferential trade agreements*, Cambridge, Cambridge University Press, 2015, 253.

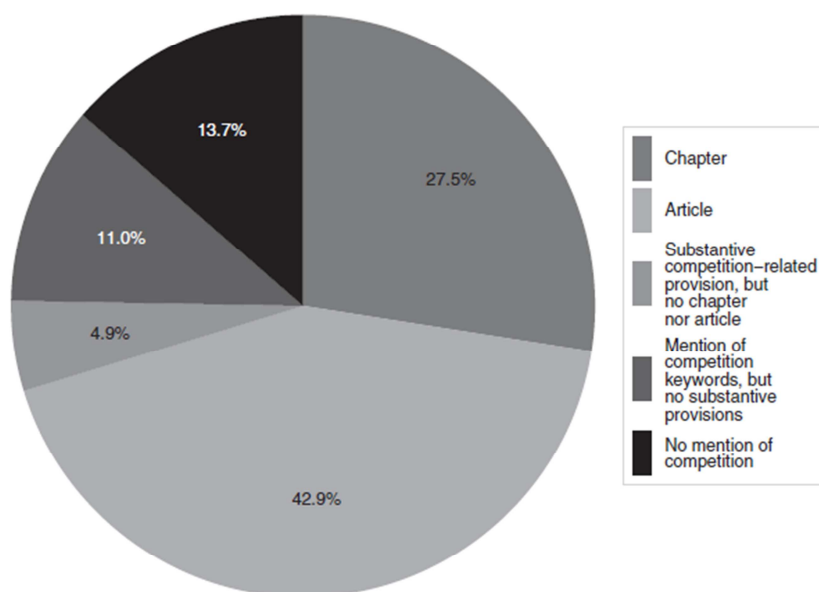


Figure 10.1 How competition policy is addressed

Figure 13. Source : A. Bradford & T. Büthe, “Competition policy and free trade – Antitrust provisions in PTAs” in A. Dür, M. Elsig (eds), *Trade cooperation – the purpose, design and effects of preferential trade agreements*, Cambridge, Cambridge University Press, 2015, 254.

1.2.3.2 New Trade Policy

After the demise of the Doha Round, the European commission launched a ‘New EU Trade Policy’ in the autumn of 2010, further building on the Commission’s Global Europe Agenda. Trade is placed in the context of Europe’s 2020 Strategy, with a clear focus on job creation and sustainable growth in a period of economic recession. While the initiative may have resulted from the multilateral dry up, the EU’s priority commitment to the multilateral level still prevails,²⁰⁰⁶ even if it is often said that the EU “*is motivated by a desire to achieve in FTAs what it has failed to achieve in multilateral negotiations*”, both with regard to market access as well as the inclusion of the Singapore issues.²⁰⁰⁷ The factors that lead to this renewed trade policy have not reversed since. Ever-increasing globalisation has led to a somewhat “*disorderly economic integration process, characterized by fragmented development and production processes of worldwide goods and services and foreign direct investment flows*.”²⁰⁰⁸ The global value chain is marked by different intellectual property protection rules, government procurement policies and other more or less divergent regulatory regimes. In addition, trade policy decisions must increasingly take into account non- economic considerations.²⁰⁰⁹

²⁰⁰⁶ H. Paemen, “A new trade policy” in D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae civis Liber Amicorum Jacques Steenbergen*, Gent, Larcier, 2014, 131; European Commission, Trade, Growth and World Affairs – Trade Policy as a Core Component of the EU’s 2020 Strategy, COM(2010)612, November 2010.

²⁰⁰⁷ S. Woolcock, “European Union policy towards Free Trade Agreements”, ECIPE Working paper no. 03/2007, 4.

²⁰⁰⁸ H. Paemen, “A new trade policy” in D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae Civis – Liber Amicorum Jacques Steenbergen*, Gent, Larcier, 2014, 132.

²⁰⁰⁹ Ibid.

The multilateral paralysis has, nevertheless, lead the Commission to pragmatically focus more on its bilateral relations, among other reasons because its main trading partners were doing the same thing.²⁰¹⁰ The European Parliament, in its 2013 resolution on EU cooperation agreements on competition policy enforcement, while welcoming the EU's efforts in this field via MOUs and cooperation agreements, nevertheless called "*on the Commission and the Council to give greater priority to strengthening the competition policy section in FTAs*" even though it regards FTA provisions as a mere first step towards cooperation.²⁰¹¹ As international anticompetitive behaviour was for a long time largely seen as a consequence of international trade liberalization, attempts to regulate such behaviour have long stood in the shadow of traditional trade negotiations. An additional reason why nationally sensitive competition laws were relatively late to the trade buffet was that traditional trade negotiations generally prioritise measures with little impact on national sovereignty in the negotiations process, while postponing more sensitive issues, in particular those associated with internal regulations.²⁰¹²

1.2.4 Several types of EU FTAs

FTAs concluded by the EU are generally divided into several broad categories, along their primary motives, and with consequences for the competition provisions in them.

A first category consists of agreements with (potential) candidate countries. These agreements are concluded in an EU enlargement context. They take the form of association agreements with geographically close neighbours for which the EU is prepared to offer accession or some slightly looser relationship. A second category indeed consists of trade agreements concluded in the framework of the European Neighbourhood Policy (ENP), both with regard to the Southern Mediterranean as well as the Eastern neighbours, concluded in order to promote economic development and political stability around the EU borders. They take the form of Europe Agreements, Euro-Med Association Agreements, and Stability and Association Agreements. The third category of agreements is largely motivated by (historical) development policy objectives. These are the Economic Partnership Agreements with 71 small and mostly poor developing countries in Africa, the Caribbean, and the Pacific (ACP states). Finally, some FTAs are concluded with other, more distant, trade partners, such as South Africa, Mexico, Canada, India, the Republic of Korea, and Chile, or the region-to-region negotiations with Mercosur, ASEAN, the Andean Community, and Central America. As a result of slow progress in regional negotiations, the EU has proceeded on a bilateral level with Peru, Colombia, Singapore, and Vietnam.²⁰¹³ Such agreements are more commercially motivated and aim to neutralize (potential) discrimination against EU exports and investments resulting from FTAs between third countries or to achieve commercial benefits via preferential access to foreign markets.²⁰¹⁴ This study will mainly focus on the latter category of more

²⁰¹⁰ Ibid., 133.

²⁰¹¹ European Parliament Resolution on EU Cooperation Agreements on Competition Policy Enforcement – The Way Forward, 2013/2921(RSP), 5 February 2014.

²⁰¹² P. Hilpold, "Regulating International Competition Issues by Regional Trade Agreements: A Stepping Stone Towards a Plurilateral Trade Agreement?", *European Yearbook of International Economic Law*, Vol. 4, 2013, 73.

²⁰¹³ J. Bourgeois, "Competition Policy: the Poor Relation in the European Union Free Trade Agreements" in I. Govaere, E. Lannon, P. Van Elsuwege & S. Adam (eds), *The European Union in the World – Essays in honour of Marc Maresceau*, Leiden/Boston, Martinus Nijhoff Publishers, 2014, 384; R. Ahearn, "Europe's Preferential Trade Agreements: Status, Content, and Implications", CRS Report for Congress, 3 March 2011, 8. Also see B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 191.

²⁰¹⁴ R. Ahearn, "Europe's Preferential Trade Agreements: Status, Content, and Implications", CRS Report for Congress, 3 March 2011, 3.

commercially oriented FTAs with economically and geographically diverse partners, in order to better assess the relative value of competition provisions in FTAs as compared to bilateral cooperation agreements, which are also concluded outside of a broader programme.²⁰¹⁵ This is also the reason why the European Economic Area and the Customs Union with Turkey are excluded from the analysis. The particular circumstances surrounding and characteristics of these agreements make any conclusion difficult to generalise. Finally, the recent ‘mega-FTAs’, such as CETA and TTIP, could be seen as forming yet another category of EU FTAs. DUSCHESNE stated that mega-FTAs are “*necessary artefacts of a more complex world economy where no amount of goodwill among 159 trading partners can help solve convoluted beyond-the-border commercial and financial issues.*”²⁰¹⁶ Such agreements will be scrutinised in this study as well.

As becomes clear from the above categorization, the motivation underlying the conclusion of FTAs can be quite diverse. While some FTAs were shaped by development or foreign policy and security considerations, others were initialised based on commercially strategic reflections, in line with the above-sketched policy changes. Among such commercial factors, one can distinguish between neutralizing potential trade diversion resulting from FTAs between third countries, creating strategic links with countries undergoing rapid economic growth, and strengthening the implementation of existing international trade rules *sensu lato*. The EU–Central America FTA negotiations, EU–ASEAN and EU–South Korea FTA initiatives, for instance, have followed FTAs of those regions with the US (CAFTA, US–Singapore, US–Thailand, US–Malaysia, and US–Korea) and to a lesser extent Japan. Strategic (trade and investment) links with important emerging markets, such as Mercosur (which experienced rapid growth when the regional agreement was initiated), South East Asia, and India were strengthened. Generally, the EU will conclude an FTA when there is a clear economic rationale to do so, in the form of a real increase in market access in addition to that achieved at WTO-level.²⁰¹⁷

1.3 Competition chapters in bilateral EU FTAs: from traditional FTAs over post-Global Europe FTAs to mega-FTAs

1.3.1 Traditional FTAs

An analysis of three ‘traditional’ FTAs concluded prior to 2006, in particular the EU-Mexico Global Agreement together with Joint Council Decision 2/2000, the EU-Chile Association Agreement, and the EU-South Africa Trade, Development and Cooperation Agreement, provide a representative image of some characteristic competition provisions of traditional FTAs.

The basis for the EU-Mexico FTA, the first agreement signed between the EU and a Latin American country, was formed by the Economic Partnership, Political Coordination and Cooperation Agreement (the ‘Global Agreement’), the Interim Agreement and a Final Act signed in Brussels on 8 December 1997. Diplomatically, the FTA was a reaction to the increasing influence of the US

²⁰¹⁵ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 94. Also see S. Woolcock, “European Union policy towards Free Trade Agreements”, ECIPE Working paper no. 03/2007, 2.

²⁰¹⁶ E. Duchesne, “Help yourself at the trade buffet: EU’s FTA and the future of multilateral negotiation”, PowerPoint-presentation on file with author.

²⁰¹⁷ S. Woolcock, “European Union policy towards Free Trade Agreements”, ECIPE Working paper no. 03/2007, 3-4.

through the NAFTA.²⁰¹⁸ The overall agreement covers a wide array of issues, ranging from political dialogue on democracy, human rights, poverty, terrorism, migration and regional development to the creation of a WTO compatible free trade area in goods and services, liberalization of capital movements and payments, mutual opening of the procurement markets, and adoption of disciplines in the fields of competition and intellectual property rights.²⁰¹⁹

In the main agreement, which came into force in 2000, only one article was dedicated to competition. The parties stated that they “*shall agree on the appropriate measures in order to prevent distortions or restrictions of competition that may significantly affect trade between Mexico and the Community*”.²⁰²⁰ Mechanisms of cooperation and coordination among the competition authorities, including mutual legal assistance, notification, consultation and exchange of information, were to be established by the Joint Council, which did so in Annex XV to its Decision No. 2/2000 of 23 March 2000.²⁰²¹ The aim of such cooperation was to achieve transparency in the enforcement of competition laws and policies.

Annex XV covers agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings, the abuse by one or more undertakings of a dominant position, mergers, commercial state monopolies, and public undertakings and undertakings to which special or exclusive rights have been granted.²⁰²² State aid is excluded. It contains relatively extensive and detailed coordination and cooperation clauses with regard to the parties’ competition policies.²⁰²³ The objectives are to promote cooperation and coordination between the parties, to provide mutual assistance, and to avoid adverse effects on trade and economic development. Particular attention should be given by the Commission to agreements between companies, decisions to form an association between companies and concerted practices between companies, abuse of dominant position and mergers, and by Mexico to absolute or relative monopolistic practices and mergers.²⁰²⁴ The Annex relies on the already existing ‘well-established’ competition laws and agencies. Notification and exchange of information are regulated in a detailed and binding manner. Information exchange even goes so far as to include assistance in collecting information on the respective territories of the parties. The Annex also deals with coordination of enforcement activities, consultations and a provision on avoidance of conflicts. It concludes with provisions on confidentiality and technical cooperation. Despite the rather clear obligations of the parties, there is some evidence indicating a rather asymmetrical implementation of the agreement. For instance, while by 2010 the Mexicans had notified the EU of their enforcement activity thirty-one times, they only

²⁰¹⁸ P. Holmes, A. Papadopoulos, B. Özgür Kayali & A. Sydorak, “A Taxonomy of International Competition Cooperation Provisions”, paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 101.

²⁰¹⁹ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 102.

²⁰²⁰ Article 11 EU-Mexico Global Agreement.

²⁰²¹ EC-Mexico Joint Council, Decision No. 2/200 of 23 Mar. 2000, Annex XV [2000], *OJ L157/10*.

²⁰²² Article 11 EU-Mexico Global Agreement.

²⁰²³ J. Bourgeois, “Competition Policy: the Poor Relation in the European Union Free Trade Agreements” in I. Govaere, E. Lannon, P. Van Elsuwege & S. Adam (eds), *The European Union in the World – Essays in honour of Marc Marescau*, Leiden/Boston, Martinus Nijhoff Publishers, 2014, 386.

²⁰²⁴ Article 1 EC-Mexico Joint Council, Decision No. 2/200 of 23 Mar. 2000, Annex XV [2000], *OJ L157/10*.

received notification of the EU on one occasion. This might indicate that the EU interprets the agreement quite narrowly.²⁰²⁵

The Competition Policy section of the EU-South Africa Trade, Development, & Co-operation Agreement of 1999 equally relies on coordination and cooperation rather than including substantive competition clauses. It starts by outlining the behaviour that is considered incompatible with the agreement insofar as it affects trade between both parties. Given the limited experience of South Africa with competition policy at the time of the conclusion of the agreement, it was provided that “[i]f, at the entry into force of this Agreement, either Party has not yet adopted the necessary laws and regulations for the implementation of [the article mentioning the incompatible behaviour], in their jurisdictions it shall do so within a period of three years.”²⁰²⁶ If such measures should not exist or be inadequate, the parties may take their own appropriate measures. The agreement furthermore incorporates the comity principle and provides for technical assistance. Parties shall exchange information, taking into account the limitations imposed by requirements of professional and business secrecy. The Agreement also contains a section on public aid, although public undertakings are excluded from the rules. Parties may enter into consultations if they consider that an incompatible practice is not adequately dealt with, and they may invite the Cooperation Council to examine the parties’ public policy objectives justifying the grant. It is moreover explicitly stated that the principle of transparency should be respected. When the relevant rules or procedures do not exist, the agreement foresees that the relevant provisions of the GATT and the WTO Agreement on Subsidies and Countervailing Measures shall apply.²⁰²⁷ South Africa was still in the process of implementing and fine-tuning its competition system, making a clear recognition of its competition laws by the EU, as done in the other two agreements, difficult.²⁰²⁸ This also explains why no substantive changes are required in the respective parties’ laws.²⁰²⁹

The 2002 EU-Chile Association Agreement replaced the 1996 framework cooperation agreement, establishing a political and economic association between Chile and the EU. The 2002 Agreement was applauded for its level of detail and the fact that it established an intense level of cooperation on political and trade matters.²⁰³⁰ Like the EU-Mexico agreement, the EU-Chile agreement did not contain substantive obligations on competition policy, but focused entirely on cooperation, in particular via the regulation of notification, consultation, exchange of non-confidential information and technical assistance. In contrast to the former agreement, however, the obligations in the latter agreement are less detailed and contain only weak obligations, demonstrated by recurring use of the words ‘may’, ‘best efforts’, ‘full and sympathetic consideration’, and the continuous emphasis on the autonomy and freedom of the parties. It does provide for information exchange in the field of state aid, and subjects public enterprises and enterprises entrusted with special or exclusive rights

²⁰²⁵ P. Holmes, A. Papadopoulos, B. Özgür Kayali & A. Sydorak, “Trade and Competition in RTAs: a Missed Opportunity?” in P. Brusick, A.M. Alvarez & L. Cernat (eds), *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*, United Nations Publication, 2005, 102-103.

²⁰²⁶ Article 36 EU-South Africa Trade, Development and Cooperation Agreement.

²⁰²⁷ Articles 35-44 EU-South Africa Trade, Development and Cooperation Agreement.

²⁰²⁸ J. Bourgeois, “Competition Policy: the Poor Relation in the European Union Free Trade Agreements” in I. Govaere, E. Lannon, P. Van Elsuwege & S. Adam (eds), *The European Union in the World – Essays in honour of Marc Maresean*, Leiden/Boston, Martinus Nijhoff Publishers, 2014, 382.

²⁰²⁹ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 114.

²⁰³⁰ Ibid., 103.

(including designated monopolies) to competition rules. Importantly, it is explicitly stated that the competition title is entirely excluded from the Dispute Settlement Mechanism.²⁰³¹

The diversity of the EU's traditional FTAs is reflected in the competition chapters of those agreements. The EU-Mexico agreement for instance does not refer to public aid or state aid, while the EU-South Africa agreement is rather comprehensive on this issue. While the EU-Chile agreement foresees information exchange obligations in this field, the terms 'public' or 'state aid' are left undefined and WTO-conform countervailing measures are allowed. The latter agreement is the only one including relevant provisions with regard to public monopolies of a commercial character, and a provision on positive comity only appears in the EU-South Africa agreement.²⁰³² What the agreements do have in common is their focus on cooperation, rather than substantive issues, and that mergers are consistently excluded. Recurrent competition provisions found in such 'traditional' FTAs relate to practices inconsistent with the agreement, notification and cooperation, provisions relating to respect for procedural rights of defence and the transparency principle, information exchange, consultations, comity, mutual recognition, and technical assistance. It is said that the EU-Mexico Agreement (and its Joint Council Decision) and the EU-Chile Agreement can be considered the most complete EU FTAs of that time, containing rather similar obligations as those resulting from competition enforcement cooperation agreements.²⁰³³ Both the EU-Chile and EU-Mexico Agreements are currently being renewed.²⁰³⁴

1.3.2 Post-Global-Europe FTAs

Since 2006, DG Competition has been negotiating competition provisions in around forty trade agreements. The number and variety of such agreements justifies a comparative study. This section will analyse two post-global-Europe FTAs – the EU-South Korea and EU-Peru/Colombia/Ecuador FTAs – and six (completed or future) DCFTAs: with Moldova, Georgia, Ukraine, Tunisia, Singapore, and Vietnam.

The 2011 EU-South Korea Free Trade Agreement²⁰³⁵ was considered to be the first of a new generation of FTAs,²⁰³⁶ and at the time also the most comprehensive one concluded by the EU.²⁰³⁷

²⁰³¹ Articles 172-180 EU-Chile Association Agreement; J. Bourgeois, "Competition Policy: the Poor Relation in the European Union Free Trade Agreements" in I. Govaere, E. Lannon, P. Van Elsuwege & S. Adam (eds), *The European Union in the World – Essays in honour of Marc Maresceau*, Leiden/Boston, Martinus Nijhoff Publishers, 2014, 386.

²⁰³² A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 126-127, 134.

²⁰³³ J. Bourgeois, "Competition Policy: the Poor Relation in the European Union Free Trade Agreements" in I. Govaere, E. Lannon, P. Van Elsuwege & S. Adam (eds), *The European Union in the World – Essays in honour of Marc Maresceau*, Leiden/Boston, Martinus Nijhoff Publishers, 2014, 387; A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 129-130. For a more elaborate analysis, see J. Bourgeois, "Competition Policy: the Poor Relation in the European Union Free Trade Agreements" in I. Govaere, E. Lannon, P. Van Elsuwege & S. Adam (eds), *The European Union in the World – Essays in honour of Marc Maresceau*, Leiden/Boston, Martinus Nijhoff Publishers, 2014, 381-397.

²⁰³⁴ See <http://ec.europa.eu/trade/policy/countries-and-regions/countries/mexico/> and <http://ec.europa.eu/trade/policy/countries-and-regions/countries/chile/> (accessed May 2017).

²⁰³⁵ Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, Brussels, 6 October 2010 (KOREU FTA).

²⁰³⁶ H. Paemen, "A new trade policy" in D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae civis Liber Amicorum Jacques Steenbergen*, Gent, Larcier, 2014, 133.

²⁰³⁷ See European Commission, Trade, "EU-Korea FTA – What's in it for EU companies?", 27 October 2011, available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=747> (accessed January 2012).

The main objective of the KOREU FTA is to liberalize (and facilitate) trade in goods, services and investment, as well as the government procurement markets of the parties.²⁰³⁸ Furthermore, the parties aim to protect intellectual property rights and to promote Foreign Direct Investment (FDI), as well as contributing to the harmonious development and expansion of world trade and to sustainable development. Promoting competition is mentioned as an objective in the context of the economic relations between the parties. The agreement comprises fifteen chapters, of which one explicitly deals with competition. The parties are required to maintain comprehensive competition laws which effectively address restrictive agreements, concerted practices and abuse of dominance by one or more enterprises, and which provide effective control of concentrations between enterprises, and the activities restricting competition that are incompatible with the agreement are enumerated. The agreement covers restrictive agreements, concerted practices, abuse of dominance and concentrations.²⁰³⁹ The parties should also maintain a competition authority, respect procedural fairness and the rights of defence, and make public information available to the other party.²⁰⁴⁰ Two articles deal with public enterprises and enterprises entrusted with special rights or exclusive rights and with state monopolies.²⁰⁴¹ The parties recognise the importance of cooperation and state that they shall cooperate through enforcement cooperation, notification, consultation and exchange of non-confidential information, based on the dedicated agreement of 2009.²⁰⁴² This provision is rather atypical as indeed a detailed cooperation agreement was already concluded before the FTA, which makes the context in which the competition provisions were included in the FTA quite particular. Furthermore, it is specified in the FTA that in the absence of more specific rules in the dedicated competition agreement, a party shall, on request of the other party, enter into consultations regarding representations made by the other party, to foster mutual understanding or to address specific competition matters. It is also stated that each party shall endeavour to provide relevant non-confidential information to the other party.²⁰⁴³ This is a very weak provision, as the parties do not commit themselves even though only non-confidential information is at stake. The section on competition matters does not fall under the DSM provided for by the FTA.²⁰⁴⁴ A distinct feature of this FTA is that the section dedicated to subsidies, which is remarkable in itself as it was the first time an EU FTA contained a prohibition on certain types of subsidies,²⁰⁴⁵ does fall under the DSM, even if it refers to types of subsidies not regulated on WTO level.²⁰⁴⁶

Even though the FTA between the EU, Columbia and Peru is trilateral and thus does not fit perfectly in the scope of this study, its content is still worth discussing. The FTA with Colombia and

²⁰³⁸ Article 1.1(2) KOREU FTA.

²⁰³⁹ The competition chapter covers Articles 11.1–11.15 KOREU FTA.

²⁰⁴⁰ Article 11.3 KOREU FTA.

²⁰⁴¹ Article 11.4 & 11.5 respectively KOREU FTA.

²⁰⁴² Article 11.6 KOREU FTA.

²⁰⁴³ Article 11.7 KOREU FTA.

²⁰⁴⁴ Article 11.8 KOREU FTA. For an analysis of the reasons why competition chapters are kept out of the dispute settlement mechanism, see below, Part III, 1.2.5.3. Also see D. Daniel Sokol, “Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements”, *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 262-273.

²⁰⁴⁵ Articles 11.9-11.15 KOREU FTA. European Commission, Report on Competition Policy 2010, COM(2011) 328 final, SEC(2011) 690 final, 10 June 2011, 38-39; Commission Staff Working Paper SEC(2011) 690 final accompanying the Report from the Commission on Competition Policy 2010 COM(2011) 328 final, 10 June 2011, 113. Also see A. Jarosz-Friis, N. Pesaresi & C. Kerle, “EU-Korea FTA: A Stepping Stone towards Better Subsidies’ Control at the International Level”, *Competition Policy Newsletter*, No. 1, 2010, 78–80.

²⁰⁴⁶ J. Bourgeois, “Competition Policy: the Poor Relation in the European Union Free Trade Agreements” in I. Govaere, E. Lannon, P. Van Elsuwege & S. Adam (eds), *The European Union in the World – Essays in honour of Marc Marescau*, Leiden/Boston, Martinus Nijhoff Publishers, 2014, 390-391.

Peru was the result of the slow progress in regional negotiations with the Andean Community.²⁰⁴⁷ In 2014, the negotiations were finalized for Ecuador to adhere to this agreement as well.²⁰⁴⁸ In the agreement, similar general objectives are mentioned as in the KOREU FTA, although competition is mentioned less prominently: “*The objectives of this agreement are [...] conduct of economic activities, in particular those regarding the relations between the parties, in conformity with the principle of free competition.*”²⁰⁴⁹ As in the KOREU FTA, one title is dedicated to competition.²⁰⁵⁰ The parties acknowledge the importance of free competition and dedicate themselves to applying their respective competition policies and laws. They agree on a list of practices inconsistent with the FTA,²⁰⁵¹ and they recognize the importance of cooperation and coordination.²⁰⁵² Furthermore, it is announced that each party shall maintain competition laws and authorities and adopt appropriate actions, with respect to the principle of due process and the rights of defence. However, it is equally underlined that each party shall maintain its autonomy.²⁰⁵³ The parties will make their best efforts to cooperate, and a party may request cooperation, but it is explicitly formulated that this shall not prevent the parties concerned from taking independent decisions. Competition authorities may exchange information, but only insofar as possible under domestic law. A party may request that another party initiates the enforcement activities established under its legislation. This provision can be interpreted as referring to positive comity.²⁰⁵⁴ Other articles deal with notification²⁰⁵⁵ and designated monopolies and state enterprises, which must be subject to competition laws insofar as their performance is not obstructed.²⁰⁵⁶ Technical assistance is also offered. Final provisions deal with consultations, and the fact that no recourse can be made by any of the parties to the DSM provided by the FTA. The FTA states that the initiation of consultations shall be accepted, and that the fullest considerations must be given to the concerns of the requested party.²⁰⁵⁷ There is therefore no guarantee about the continuation of the consultations. It should finally be mentioned that the FTA includes provisions on subsidies in the trade remedies chapter in the section on anti-dumping and countervailing measures. In this context the notification obligations under the relevant WTO agreement are reaffirmed, but it is added for the first time that the parties are allowed to exchange information on subsidies to services upon request.²⁰⁵⁸

²⁰⁴⁷ R. Ahearn, “Europe’s Preferential Trade Agreements: Status, Content, and Implications”, CRS Report for Congress, 3 March 2011, 8.

²⁰⁴⁸ European Commission, Press Release, “EU and Ecuador Conclude Negotiations for Trade and Development Agreement”, IP/14/845, Brussels, 17 July 2014.

²⁰⁴⁹ Title I, Article 4 FTA EU-Colombia-Peru. The title on competition is Title VIII FTA EU-Colombia-Peru, covering Articles 258-266.

²⁰⁵⁰ Title VIII FTA EU-Colombia-Peru.

²⁰⁵¹ This list includes “(a) any agreement, decision, recommendation or concerted practice, which has the purpose or effect of impeding, restricting, or distorting competition in accordance with their respective competition laws; (b) the abuse of a dominant position in accordance with their respective competition laws; and (c) concentrations of companies which significantly impedes effective competition, particularly as a result of the creation or strengthening of a dominant position in accordance with their respective competition laws.” Article 259(2) FTA EU-Colombia-Peru.

²⁰⁵² Article 258 and 259 FTA EU-Colombia-Peru.

²⁰⁵³ Article 260 FTA EU-Colombia-Peru.

²⁰⁵⁴ Article 261 FTA EU-Colombia-Peru.

²⁰⁵⁵ Article 262 FTA EU-Colombia-Peru.

²⁰⁵⁶ Article 263 FTA EU-Colombia-Peru.

²⁰⁵⁷ Articles 265 and 266 FTA EU-Colombia-Peru.

²⁰⁵⁸ “Without prejudice to Article 6.5 of the Anti-dumping Agreement and Article 12.4 of the Subsidies Agreement, each Party shall ensure, as soon as possible in accordance with its domestic legislation after the imposition of provisional measures, and in any event, prior to any final determination, full and meaningful disclosure of the essential facts under consideration which constitute the basis for the decision as to whether or not to apply measures. The disclosure of such information shall be made in writing and allow interested parties sufficient time to make comments.” Article 38(3) FTA EU-Colombia-Peru. Also see Commission Staff Working Paper SEC(2011) 690 final accompanying the Report from the Commission on Competition Policy 2010 COM(2011) 328 final, 10 June 2011, 112.

The EU-Ukraine, EU-Georgia and EU-Moldova FTAs were announced as being the first in a series of so-called Deep and Comprehensive Free Trade Agreements (DCFTAs).²⁰⁵⁹ Their competition chapters are nevertheless very diverse. The EU-Ukraine FTA was the first of the announced series of deep and comprehensive free trade agreements.²⁰⁶⁰ It is somewhat particular as it provides for extensive approximation to the EU *acquis* with regard to competition law, and includes the scope of the EU *acquis* to which Ukraine should approximate its laws in the body of the agreement, while generally regulatory approximation is contained in an annex to the agreement. This implies that the procedure to change such competition provisions will be more difficult than if the latter were included in an annex. A formal treaty change will be required, which is more rigid and burdensome than the procedures generally foreseen for changes to annexes in the agreements themselves, only requiring a decision from a joint committee or association council where the agreement allows this. The DCFTA with Ukraine is described as “*one of the most ambitious bilateral agreements that the EU has ever negotiated with a trading partner*” and should offer Ukraine a framework for modernization of trade and investment relations and for economic development.²⁰⁶¹

What is characteristic of the EU-Ukraine DCFTA are indeed the provisions on approximation of law and enforcement practice, with strict deadlines and hard obligations regarding substantive requirements for the domestic regime. Ukraine will align its competition law and enforcement practice to that of the EU *acquis* in a number of fields. This type of commitment cannot be found in other DCFTAs.²⁰⁶² The competition chapter is more elaborate than the other DCFTAs with Eastern European neighbours.²⁰⁶³ The first section on antitrust and mergers traditionally elaborates on the importance of regulating anti-competitive behaviour, and indicates the practices that are considered inconsistent with the agreement. Parties should maintain effective competition laws and authorities, respecting transparency, timeliness, non-discrimination, procedural fairness and rights of defence. More concrete obligations are imposed on the parties, such as explaining the setting of pecuniary sanctions and the principles used in the assessment of horizontal mergers. Provisions on public enterprises and enterprises entrusted with special or exclusive rights are foreseen, and state monopolies are also regulated. Parties should exchange information and cooperate on enforcement matters, although the obligations are again particularly weak, stating that “*the competition authority of a Party may inform the competition authority of the other Party of its willingness to cooperate with respect to enforcement activity. This cooperation shall not prevent the Parties from taking independent decisions.*”²⁰⁶⁴ The agreement foresees that the parties should consult each other, but this is not regulated in detail. While the parties ‘shall’, on request, consult each other, and ‘shall’ do so promptly, they should only ‘endeavour’ to provide relevant non-confidential information to the other Party to facilitate discussion. Unsurprisingly, the entire section is excluded from the DSM.

²⁰⁵⁹ European Commission, “The EU’s Association Agreements with Georgia, the Republic of Moldova and Ukraine”, MEMO/14/430, Brussels, 23 June 2014.

²⁰⁶⁰ See <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/ukraine/> (accessed January 2012).

²⁰⁶¹ EEAS, “The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area - What’s it all about?”, http://eeas.europa.eu/archives/delegations/ukraine/documents/virtual_library/vademecum_en.pdf (accessed July 2017), 9.

²⁰⁶² G. Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area - A New Legal Instrument for EU Integration without Membership*, Leiden/Boston, Brill Nijhoff, 2016, 277-278.

²⁰⁶³ Articles 253-267 EU-Ukraine DCFTA.

²⁰⁶⁴ Article 259(2) EU-Ukraine DCFTA.

State aid distorting or threatening to distort competition is incompatible with the agreement, except when it serves a particular function listed in the agreement, in either the ‘white list’ or the ‘grey list’, indicating the types of state aid that ‘shall’ or ‘may be considered to’ be compatible with the functioning of the agreement. These factors are largely taken over from Article 107(2) and (3) TFEU, including objectives allowed under the EU horizontal block exemption regulations.²⁰⁶⁵ Ukraine commits itself to adopting a system of control of state aid similar to that in the EU and inspired by TFEU articles, including an independent authority entrusted with the necessary powers for the full application of the state aid provisions in the DCFTA. The level of detail in these provisions can also be considered quite novel, as several other recent EU FTAs build upon the WTO SCM Agreement (Subsidies and Countervailing Measures) rather than mirroring TFEU Articles. The fact that referral is made to the relevant jurisprudence of the CJEU as source of interpretation is remarkable, even if the obligation remains less strong than in for instance the chapter on services and establishment.²⁰⁶⁶ The principle of transparency in this context is made tangible via concrete obligations. The total amount, types and sectorial distribution of state aid which may affect trade between the parties should annually be notified. Articles 106, 107 and 93 TFEU shall serve as sources of interpretation. Finally, concrete changes to the domestic system of state aid control are required and listed in the agreement.

The competition chapters in the Moldova and Georgia DCFTAs are less detailed and comprehensive than the EU-Ukraine DCFTA. The competition chapter in the DCFTA with Georgia is very superficial.²⁰⁶⁷ Cooperation provisions are not foreseen. Principles governing anti-competitive business practices and state interventions as well as subsidies provide that parties should maintain comprehensive and effective competition laws, and implement such legislation via a functioning authority, respecting the principles of transparency, non-discrimination, procedural fairness and respect for the rights of defence. Some provisions deal with the regulation of state monopolies, state enterprises and enterprises entrusted with special or exclusive rights, mainly requiring transparency. Contrary to the Moldova and Ukraine DCFTAs, the Georgia DCFTA refers to the WTO Agreement on Subsidies and Countervailing measures, without however introducing commitments to prohibit specific types of subsidies.²⁰⁶⁸ The provision on subsidies is not excluded from the DSM, in contrast to the rest of the competition chapter. There is no prejudice to the rights and obligations in the WTO agreement, and parties should adhere to domestic rules on professional and business secrets.²⁰⁶⁹

The EU-Moldova DCFTA’s competition chapter is comprised of two sections, one dealing with antitrust and mergers, and one revolving around state aid.²⁰⁷⁰ Again the obligation exists to maintain competition laws and operational authorities. The provision on the implementation of competition laws emphasizes the independence of the competition authorities, a feature that is not present in any of the other DCFTAs. Again, state monopolies, public undertakings and undertakings entrusted with special or exclusive rights are regulated, in the sense that they should be subject to competition laws.

²⁰⁶⁵ G. Van der Loo, “Mapping out the Scope and Contents of the DCFTAs with Tunisia and Morocco”, EuroMeSCo Series, March 2016, 32.

²⁰⁶⁶ G. Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area - A New Legal Instrument for EU Integration without Membership*, Leiden/Boston, Brill Nijhoff, 2016, 278-279.

²⁰⁶⁷ Articles 203-209 EU-Georgia DCFTA.

²⁰⁶⁸ G. Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area - A New Legal Instrument for EU Integration without Membership*, Leiden/Boston, Brill Nijhoff, 2016, 279-280.

²⁰⁶⁹ Article 209 EU-Georgia DCFTA.

²⁰⁷⁰ Articles 333-344 EU-Moldova DCFTA.

Furthermore, cooperation and exchange of information is foreseen. However, the relevant provision is rather weak, merely stating that *“each competition authority may inform the other competition authority of its willingness to cooperate with respect to the enforcement activity of any of the Parties.”*²⁰⁷¹ Exchange of non-confidential information is allowed, subject to the confidentiality laws of each party and limited by the national requirements of professional and business secrecy. The entire section is excluded from dispute settlement. The section on state aid does not apply to fisheries and agriculture. Within five years from the entry into force of the DCFTA, the assessment of state aid should take place following EU law, including case-law, and in particular Article 107 TFEU, and within two years the parties are to establish and maintain state aid legislation and an operationally independent authority, of which the main powers are made explicit in the FTA, while adhering to the transparency-principle, including a duty to report to the EU and an obligation to provide information on request with regard to individual cases that may be seen as affecting trade relations between the parties. An alignment period is foreseen for state aid schemes instituted before the establishment of the state aid authority. Again parties should ‘take into account’ limitations following from professional and business secrecy obligations, and a rather unique review clause is included.²⁰⁷² Moldova’s competition agency as well as the judiciary are intensively guided by the Commission in correctly implementing these provisions.

In short, while the Ukraine DCFTA contains an Approximation clause (Art. 256), TFEU inspired rules on antitrust and mergers (Art. 254) as well as detailed rules on state aid, including obligation to adopt a system of state aid control, similar to that in the EU (Arts. 262-267), the Moldova and Georgia DCFTAs lack an approximation clause. The former does contain general provisions on antitrust and mergers (Arts. 334- 335) and detailed rules on state aid, but no commitment to adopt a system of state aid control, while the latter does not even contain detailed rules on state aid but refers to WTO SCM Agreement (Art. 208).²⁰⁷³

DCFTAs are underway with the southern neighbours as well, such as Tunisia and Morocco. Negotiations with Morocco started in 2013 after an independent Sustainability Impact Assessment, and will expand on the Free Trade Area created under the EU-Morocco Association Agreement, existing since 2000, by including novel issues such as trade in services and investment.²⁰⁷⁴ Tunisia only entered into negotiations in 2016. The negotiations will similarly build on the 1995 Association Agreement which created a Free Trade Area between the EU and Tunisia, already prohibited certain practices and transactions (e.g. cartels and abuse of a dominant position), and created rules for state aids that may affect trade between the EU and Tunisia. As was the case for the EU-Morocco DCFTA, the negotiations are intended to create new trade and investment opportunities and to further integrate Tunisia's economy into the EU single market by supporting on-going economic reforms in Tunisia and bringing Tunisian trade legislation closer to that of the EU.²⁰⁷⁵ The inclusion of a competition chapter, including state aid provisions, is justified by the EU be referring to the detrimental effects of anticompetitive activities on the benefits of trade liberalization as well as the need to ensure a level playing field for companies on both sides. The objective of the chapter is clearly stated in market-access terms.²⁰⁷⁶

²⁰⁷¹ Article 337 EU-Moldova DCFTA.

²⁰⁷² Articles 340-342 EU-Moldova DCFTA.

²⁰⁷³ G. Van der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area - A New Legal Instrument for EU Integration without Membership*, Leiden/Boston, Brill Nijhoff, 2016, 317.

²⁰⁷⁴ See <http://ec.europa.eu/trade/policy/countries-and-regions/countries/morocco/> (accessed July 2017).

²⁰⁷⁵ See <http://ec.europa.eu/trade/policy/countries-and-regions/countries/tunisia/> (accessed July 2017).

²⁰⁷⁶ *“The objective of the chapter on competition of the Association agreement is to ensure that companies on both sides have fair and equal access to each other’s markets, unhampered by anti-competitive practices.”* Negotiations for a Deep and Comprehensive Free Trade

It is worth mentioning that while the existing FTAs concluded in the framework of Euromed Association Agreements indeed already contained substantive competition law provisions on cartels, abuse of dominant position and state aid which had to be applied in conformity with the relevant EU provisions, the required decisions of the Association Councils, necessary for the implementation of such rules, were never adopted. VAN DER LOO therefore rightly suggests that “[t]he DCFTAs with Tunisia and Morocco could maybe take over some provisions of the EaP DCFTAs which are more detailed and focus more on the implementation and enforcement of competition legislation, including rules on procedural fairness and the right of defence.”²⁰⁷⁷ In the EU fact sheet on the EU-Tunisia FTA, the Commission indeed indicates that its proposal aims to operationalize the Association Agreement, in particular with regard to state aid. It intends to do so first by completing and clarifying the provisions in force via updated references to the Treaties as well as secondary legislation and case law of the CJEU. Second, by requiring antitrust, merger, and state aid legislation in line with the EU *acquis* as well as operationally independent competition and state aid authorities that hold the resources and powers to effectively enforce competition and state aid laws respectively.²⁰⁷⁸ Discussions on dispute settlement are still ongoing.²⁰⁷⁹

The EU proposal for the DCFTA with Tunisia first underlines the importance of free competition and the importance of competition law in the framework of trade liberalization. The anticompetitive activities that are incompatible with the agreement in so far they affect trade between the parties are listed. It is specified that such activities are to be evaluated based on the criteria present in Articles 101, 102, 106, 107 and 93 TFEU as well as relevant case-law of the CJEU. Certain exceptions are made with regard to state aid in the context of agriculture and fisheries. Transparency is required in the field of state aid, with a biennial notification obligation. The competition chapter also includes hard obligations with regard to the establishment of competition and state aid legislation and authorities. The chapter finally contains provisions on state monopolies as well as public undertakings and undertakings granted special or exclusive rights.²⁰⁸⁰ A joint report explained that the competition chapter would apply to government procurement above yet to be determined value thresholds. The EU will presumably aim to gradually liberalise the public procurement markets based on national treatment.²⁰⁸¹

Bilateral negotiations between the EU and Singapore on an FTA were started in 2010 after difficulties with the ‘region-to-region’ negotiations held between 2007 and 2009 between the EU and the ASEAN countries. The FTA with Singapore, the first deal between the EU and a Southeast Asian economy, is seen as by the EU as a building block in order to still reach a broader regional agreement and greater engagement between the EU and Southeast Asia, which remains the ultimate goal. The negotiations were completed in 2014, and the initialled agreement now awaits formal

Area between the European Union and Tunisia, The EU Proposal on Competition and State Aid, Factsheet, April 2016, available at http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154505.pdf (accessed March 2017).

²⁰⁷⁷ G. Van der Loo, “Mapping out the Scope and Contents of the DCFTAs with Tunisia and Morocco”, EuroMeSCo Series, March 2016, 31.

²⁰⁷⁸ Negotiations for a Deep and Comprehensive Free Trade Area between the European Union and Tunisia, The EU Proposal on Competition and State Aid, Factsheet, April 2016, available at http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154505.pdf (accessed March 2017).

²⁰⁷⁹ See http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154466.pdf (accessed July 2017).

²⁰⁸⁰ See http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154481.pdf (accessed July 2017).

²⁰⁸¹ G. Van der Loo, “Mapping out the Scope and Contents of the DCFTAs with Tunisia and Morocco”, EuroMeSCo Series, March 2016, 32; Rapport conjoint du premier round de négociation sur un accord de libre-échange complet et approfondi (ALECA) entre la Tunisie et l’Union européenne, Tunis, 18-21 avril 2016, 22 avril 2016.

approval by the European Commission and the Council of Ministers as well as ratification by the European Parliament. The process was stalled, however, due to a case before the CJEU regarding the EU's competence to sign and ratify the agreement, (see below, Part III, 1.4.2.4).²⁰⁸² Following the EU-Singapore FTA, the, at times difficult, negotiations on an FTA between the EU and Vietnam were concluded end of 2015. The Agreement is seen as one of the most comprehensive and ambitious trade and investment agreements concluded between the EU and a developing country.²⁰⁸³ The EU presented the competition chapter as 'inherently pro-development', underlining the vulnerability of developing country companies and consumers to anti-competitive practices and the benefits regarding the attraction of foreign investors. It moreover emphasized the positive effect that transparency obligations and basic control of subsidies may have on the spending of scarce public resources.²⁰⁸⁴

Both agreements require that the parties adopt or maintain comprehensive competition legislation that can effectively address anti-competitive practices, but differ in the specifications of such practices. The autonomy of the parties in the development and enforcement of their competition laws is underlined, but they are required to maintain authorities that are responsible for, and adequately equipped to effectively enforce such laws. The laws should be applied in a transparent and non-discriminatory manner, respecting the principles of procedural fairness and rights of defence. In the agreement with Singapore the right of parties to be heard prior to deciding on a case is particularly underlined.²⁰⁸⁵ The competition chapter is excluded from the dispute settlement (and in the EU-Singapore FTA also the mediation) mechanism. An exception is made in the latter agreement for prohibited subsidies. Both agreements indeed contain a section on subsidies as well. However, while the EU-Vietnam agreement takes a positive approach by listing (non-exhaustively) the public policy objectives for which subsidies could be granted, the EU-Singapore Agreement opens with a description of the subsidies that are prohibited. In both agreements reference is made to the SCM agreement. The EU-Vietnam Agreement requires transparency in the area of 'specific subsidies', while the EU-Singapore Agreement does so 'in the area of subsidies related to trade in goods and the supply of services.' The commitment to notify not only subsidies to goods but also subsidies to services goes well beyond the WTO rules. Both agreements foresee the possibility of consultations between the parties. While the EU-Singapore Agreement frames such consultations as 'fostering mutual understanding' or simply 'to address specific matters', the EU-Vietnam agreement foresees the possibility for companies to alert their governments to potential subsidies with negative effects for their businesses, allowing the latter to engage in a consultation process with the other Party to assess the situation and in the affirmative case, to find a satisfactory solution. Both subsidy chapters are subject to review. The EU heralds the ambitious nature of the commitments regarding state-owned enterprises in the EU-Vietnam FTA, in particular considering that such enterprises have traditionally been a backbone of the Vietnamese economy.²⁰⁸⁶ In the EU-Vietnam FTA the parties acknowledge that strengthening cooperation regarding policy development is in their mutual interest, yet subject to the availability of funding under cooperation programmes. The EU-Singapore Agreement provides that the parties shall endeavour to coordinate and cooperate in the context of the agreement.

²⁰⁸² See <http://ec.europa.eu/trade/policy/countries-and-regions/countries/singapore/> (accessed July 2017).

²⁰⁸³ O. Massmann, "EU- Vietnam Free Trade Agreement - market access opportunities", *Lexology*, 7 October 2016.

²⁰⁸⁴ Delegation of the European Union to Vietnam, Guide to the EU-Vietnam Free Trade Agreement, June 2016, http://trade.ec.europa.eu/doclib/docs/2016/june/tradoc_154622.pdf. (accessed July 2017), 33.

²⁰⁸⁵ Article 12.2 EU-Singapore FTA.

²⁰⁸⁶ Delegation of the European Union to Vietnam, Guide to the EU-Vietnam Free Trade Agreement, June 2016, http://trade.ec.europa.eu/doclib/docs/2016/june/tradoc_154622.pdf. (accessed July 2017), 33.

1.3.3 Mega-FTAs

The last few years have been characterised by the extreme mediatisation and politicisation of so-called ‘mega-FTAs’, or FTAs between important global players covering a lot of ground. An example is the debate on the investor-state dispute settlement mechanisms in these agreements.²⁰⁸⁷ Due to the attention of civil society and other interest groups the negotiations of these agreements have been characterised by an unprecedented level of transparency and openness. The commotion surrounding mainly the TTIP negotiations (Transatlantic Trade and Investment Partnership) spilled over to other negotiations such as the CETA-negotiations (EU-Canada Comprehensive Economic and Trade Agreement), which were in a more advanced stage even. Last minute changes were required for the latter’s signature, and its conclusion and provisional application are subject to several procedural uncertainties.

The Brexit as well as the most recent US elections have added to the uncertainty regarding the viability of these long-negotiated agreements. With regard to the Trans-Pacific Partnership Agreement (TPP), for instance, the US government, only days after President TRUMP took office, already released a statement that the Office of the US Trade Representative “*issued a letter to signatories of the Trans-Pacific Partnership Agreement that the United States has formally withdrawn from the agreement per guidance from the President of the United States.*”²⁰⁸⁸ The TPP would have involved Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the US, and Vietnam. After seven years of negotiations the final proposal was signed in February 2016. One particular aspect of the Agreement was the attention to SOE-related provisions, due to the prevalence of SOEs in East Asian economies.²⁰⁸⁹ No similar statement has been released regarding the European equivalent, TTIP, but its future is equally uncertain.²⁰⁹⁰ It nevertheless remains useful to analyse such mega-FTAs. They all seem to have one thing in common at the outset: the controversy surrounding them. The competition-related chapters in three such agreements will be analysed here: CETA, TTIP, and TPP. These are not the only mega-FTAs on the agenda, the Regional Comprehensive Economic Partnership is another example,²⁰⁹¹ but they can be considered to be the most influential ones.

1.3.3.1 CETA

The Canada-EU Comprehensive Economic and Trade Agreement is characterised by a new ‘dynamic’ for the EU, in comparison to the trade negotiations the latter was accustomed to, as it was the first time the EU negotiated such an agreement with what can be considered as an ‘equal’. CETA is the first FTA between the EU and a G8 country. It constitutes more of a dialogue rather than the predominantly one-way conditionality dynamic by which previous FTAs were characterised. It

²⁰⁸⁷ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 238.

²⁰⁸⁸ See <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership#> (accessed July 2017).

²⁰⁸⁹ T. Sekine, “Competition Related Provisions in East Asian FTAs: Their Trends and the Possible Impact of Mega FTAs”, *Chinese (Taiwan) Yearbook of International Law and Affairs*, Vol. 32, No. 86, 2014, 116. See Trans-Pacific Partnership, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> (accessed July 2017).

²⁰⁹⁰ Bradshaw, Julia, “What’s the difference between TTIP and TPP and why does Donald Trump want them scrapped?”, *The Telegraph*, 22 November 2016; O’Grady, Sean, “By scrapping TPP and TTIP, Trump has boosted American jobs in the short term – and destroyed them in the long term”, *Independent*, 24 January 2017.

²⁰⁹¹ Regional Comprehensive Economic Partnership (RCEP), http://asean.org/?static_post=rcep-regional-comprehensive-economic-partnership (accessed July 2017).

contains separate chapters for subsidies, competition policy, and state enterprises, monopolies and enterprises granted special rights or privileges.²⁰⁹²

The chapter on subsidies aims to increase transparency by requiring notification of subsidies and the production of further information on request regarding subsidisation of services. A subsidy is defined as a measure related to trade in goods, in accordance with Article 1.1 of the SCM Agreement. With somewhat different rules for the sectors of agriculture and fishing, consultations should take place between both parties on subsidies that may negatively affect trade between them. Confidential information is protected. Both parties also agree not to engage in export subsidization of agricultural products. Subsidies or government support with respect to audio-visual services in the EU and with respect to cultural industries in Canada are excluded from the Agreement. The obligations of the parties under Article VI of the GATT, SCM Agreement, and Agreement on Agriculture are reaffirmed. The consultation provisions of the subsidies chapter are excluded from dispute settlement.

The EU and Canada agreed to prohibit and sanction practices which distort competition and trade, in the form of cartels, abusive behaviour by companies with a dominant market position, and anti-competitive mergers. The parties are to take appropriate measures to proscribe anti-competitive business conduct and exclusions from the application of competition law shall be transparent. The commitments made in the cooperation agreement of 1999 are reaffirmed and the parties agree to enforce their competition laws in a fair and transparent way, in accordance with the principles of transparency, non-discrimination, and procedural fairness. The entire chapter is excluded from dispute settlement. It can be noticed here that the EU somewhat diverts from its generally more prescriptive stance regarding competition law in FTAs,²⁰⁹³ likely exactly because it is dealing with ‘an equal’.

While both parties have the full freedom of choice in the way they provide public services to their citizens, they commit not to intervene in or potentially distort the level playing field for private companies, by ensuring that state-owned enterprises, monopolies, and enterprises granted special rights will not discriminate against goods, services, or investments from the other party. Certain exceptions are foreseen.

1.3.3.2 TTIP

Negotiations for TTIP, an agreement between the world’s two largest advanced industrial economies, were launched in July 2013 and were inspired by both an economic and strategic rationale. The Agreement enables the EU and the US to jointly develop and promote common high standards in the global economy, levelling the playing field for producers, exporters, and workers.²⁰⁹⁴ According to PAEMEN, TTIP should be seen as one of the efforts to promote the transatlantic exchanges in the wake of the Cold War, a reaction to the coincident acceleration of the globalization

²⁰⁹² Chapter 7, 17, and 18 respectively.

²⁰⁹³ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 194.

²⁰⁹⁴ Office of the United States Trade Representative, “U.S.-EU Joint Report on T-TIP Progress to Date”, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/us-eu-joint-report-t-tip-progress-0> (accessed July 2017).

drive, and the financial and economic crisis.²⁰⁹⁵ JENNY explained that TTIP represented ‘a new type of trade negotiations’, as it focused more on regulatory issues than tariffs.²⁰⁹⁶

DE GUCHT, former trade Commissioner, stated during a testimony before the European Parliament’s Committee on International Trade that the agreement would ‘set the standard’, both for the EU’s future bilateral trade and investment, as well as the development of global rules.²⁰⁹⁷ The American Chamber of Commerce as well referred to TTIP as a ‘precedent-setting agreement’, that could address the fact that the importance of the EU and the US in the global marketplace is being eroded.²⁰⁹⁸ Mega-FTAs can indeed be seen as ‘rule-makers’, aimed at shaping the global rules of international trade. The danger is, however, that these potentially global rules are created in a non-global way.²⁰⁹⁹ As one US official allegedly put it, TTIP is about determining “*the rules of world trade before others do it for us.*”²¹⁰⁰ This may render genuine multilateral integration more difficult, as a certain amount of path dependence is created by indeed taking advantage of being the ‘first mover’, and using prior action to impose an outcome on other states.²¹⁰¹

AmCham noted that despite over twenty years of advanced experience in policy and enforcement cooperation, substantive policy and legal framework differences remain, such as US criminal enforcement and treble damages, EU focus on state aid and market integration focus as well as a formalistic approach in unilateral conduct cases, or US caution in the ability to predict future competitive outcomes, disagreements on procedural checks and balances, or legal privilege.²¹⁰² According to them, TTIP should not attempt to bridge all differences between the EU and the US, but should rather “*codify joint EU/US approaches in promoting best practices vis-à-vis third countries,*”²¹⁰³ thereby sending ‘key messages’ to the rest of the world regarding antitrust enforcement.²¹⁰⁴ The EU factsheet on the competition chapter in TTIP presents competition policy in TTIP as ‘a model for global policies to promote free and fair competition’.²¹⁰⁵ LAITENBERGER, from DG COMP, confirmed that the aim of the TTIP competition provisions is to confirm the importance of competition policy, reinforce the shared commitment to the robust, transparent and non-discriminatory enforcement of competition laws, and send this message to the rest of the world as

²⁰⁹⁵ H. Paemen, “A new trade policy” in D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae Civis – Liber Amicorum Jacques Steenbergen*, Gent, Larcier, 2014, 134-135.

²⁰⁹⁶ Interview d’Ignacio Garcia Bercero par Frédéric Jenny, *Demain la Concurrence*, 2016, mailing 30 Mai 2016.

²⁰⁹⁷ K. De Gucht, Testimony before the Committee on International Trade of the European Parliament, Brussels, 21 February 2013.

²⁰⁹⁸ European Parliament, Directorate-General for Internal Policies, Policy Department A – Economic and Scientific Policy, Competition Policy in International Agreements – Study for Econ Committee, IP/A/ECON/2015-02, August 2015, 32.

²⁰⁹⁹ “EU Common Commercial Policy in the Lisbon Era – Achievements and Prospects”, Policy seminar Global Governance Programme EUI, Fiesole, 16 October 2014.

²¹⁰⁰ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 237.

²¹⁰¹ J. Trachtman, “International trade: regionalism” in Andrew T. Guzman & Alan O. Sykes (eds), *Research Handbook in International Economic Law*, Cheltenham, Edward Elgar Publishing, 2007, 160.

²¹⁰² European Parliament, Directorate-General for Internal Policies, Policy Department A – Economic and Scientific Policy, Competition Policy in International Agreements – Study for Econ Committee, IP/A/ECON/2015-02, August 2015, 33.

²¹⁰³ Ibid., 35.

²¹⁰⁴ See <http://www.transatlantictrade.org/issues/competition-policy/> (accessed July 2017).

²¹⁰⁵ Factsheet competition: Competition policy in TTIP, Factsheet competition: http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153019.6%20Competition%20SoE%20Subsidies%20merg ed.pdf (accessed July 2017).

well as setting the standard for other international agreements.²¹⁰⁶ TTIP represented an opportunity for the EU and the US to emphasize shared values in adopting and enforcing competition laws and affirm their existing high standards, thereby offering an example for other countries to follow.²¹⁰⁷ The remark could be made that in this manner the ‘rule-making processes’, if they can be identified as such, in multilateral forums are being circumvented and multilateral ‘standards’ are being set without genuine multilateral input, by presenting a *‘fait accompli’* to the world. Even though, at least with regard to competition law, the US and the EU are already dominant players in the multilateral forums, this undermines genuine global input. While TTIP was presented as potentially reinforcing understanding and support for the regulatory actions of both parties and preserving the ability of governments to regulate in the public interest, it was met with a lot of resistance.²¹⁰⁸ The negotiating teams included the relevant regulators, allowing them to lead the way with regard to identifying opportunities for increased compatibility and cooperation as well as maintaining or strengthening existing protections. It is emphasised that cooperation under TTIP must be implemented in a way that is consistent with both US and EU domestic procedures.

Both the EU and the US proposals for a TTIP Competition Chapter explicitly referred to the existing competition cooperation agreements between the competition authorities of both parties. The projected added value of the TTIP Competition Chapter lay in the fact that it would go beyond cooperation among competition agencies and to agree on a set of shared principles as a basis for extending and strengthening international cooperation.²¹⁰⁹ According to the EU main issues to be resolved with regard to competition law revolve around state-owned enterprises (SOEs) and subsidies. The factsheet explicitly mentions that one of the goals is to ensure that SOEs with monopoly powers or special rights do not discriminate against private companies and that procedures to grant subsidies to companies supplying industrial goods and services become transparent.²¹¹⁰

According to one Commission official, one of the main differences between the competition chapter in TTIP and previous DCF-TAs is that the US strongly emphasises due process, and wants to go beyond mere statements of principle towards detailed provisions. Such concerns about (equalising) due process are relatively new and can only appear at an advanced stage of cooperation.²¹¹¹ In this process the prosecutorial and administrative system sometimes collide.²¹¹² Since the start of the negotiations, the parties have agreed on the importance of transparency and due process in trade

²¹⁰⁶ Interview of Johannes Laitenberger by François-Charles Lapr v te, *Concurrences Review*, mailing 12 April 2016.

²¹⁰⁷ Factsheet competition: Competition policy in TTIP, Factsheet competition: http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153019.6%20Competition%20SoE%20Subsidies%20merged.pdf (accessed July 2017).

²¹⁰⁸ Office of the United States Trade Representative, “U.S.-EU Joint Report on T-TIP Progress to Date”, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/us-eu-joint-report-t-tip-progress-0> (accessed July 2017).

²¹⁰⁹ Interview of Johannes Laitenberger by François-Charles Lapr v te, *Concurrences Review*, mailing 12 April 2016.

²¹¹⁰ Factsheet competition: Competition policy in TTIP, Factsheet competition: http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153019.6%20Competition%20SoE%20Subsidies%20merged.pdf (accessed July 2017).

²¹¹¹ “Competition policy at the intersection of equity and efficiency – honouring the scholarship of Eleanor M. Fox”, Global Competition Law Center at the College of Europe and UCL Centre for Law, Economics and Society Conference, Brussels, 8 June 2016.

²¹¹² Interview with Commission official.

remedy procedures as well as competition policy.²¹¹³ However, procedural fairness is the main area where further work is needed according to the negotiators. It proves difficult to find language that takes into account the parties' respective concerns as well as the particularities of the respective legal and administrative systems.²¹¹⁴ The competition working group of the business coalition for transatlantic trade (BCTT) publicly announced what according to them the objectives for the TTIP negotiations should be in the field of competition law. They rightly begin by stating that TTIP should clearly identify transparency and due process/procedural fairness obligations in antitrust proceedings. Competition agencies should not be represented as 'black boxes', and those under investigation should be able to regularly engage with enforcers to understand the evidence against them and the relevant theories involved. In this context TTIP should also codify OECD and ICN best practices. They finally touch upon the issue of the different scope of legal privilege in the EU and the US, which according to them should be addressed in TTIP.²¹¹⁵

In the EU's initial proposal text for the competition chapter,²¹¹⁶ the parties shall maintain antitrust and merger competition legislation, addressing in an effective manner horizontal and vertical agreements between enterprises, decisions by associations of enterprises and concerted practices which have as their object or effect the prevention, restriction or distortion of competition, abuses by one or more enterprises of a dominant position, and concentrations between enterprises which significantly impede effective competition, in particular as a result of the creation or strengthening of dominant position. The chapter would furthermore require that the Parties shall maintain operationally independent authority responsible for and appropriately equipped for the effective enforcement of the competition legislation, in adherence to the principles of transparency and non-discrimination, procedural fairness and the rights of defence of the enterprises concerned, irrespective of their nationality or ownership status. It can be assumed that both the EU and the US already fulfil these requirements. Their inclusion in the Agreement is evidence of the 'standard-setting' value it is intended to have. SOEs should be subject to competition legislation, and are further regulated in a separate chapter, the main obligations relating non-discrimination, and high standards of transparency and corporate governance.²¹¹⁷ Cooperation should be strengthened, in accordance with the cooperation agreements already concluded between the parties. Confidential information exchange or investigatory assistance is not foreseen. The parties should adhere to their respective confidentiality legislation. A review clause is foreseen. The chapter is entirely excluded from dispute settlement. With regard to subsidies, reference is made to the SCM Agreement. Fisheries and agriculture are subject to exceptions. The proposal furthermore includes basic provisions on transparency and consultations. The latter provision is not subject to dispute settlement. A review clause is foreseen and the parties should again respect their national confidentiality legislation. In addition to the core elements mentioned in the negotiation text, the EU

²¹¹³ Office of the United States Trade Representative, "U.S.-EU Joint Report on T-TIP Progress to Date", <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/us-eu-joint-report-t-tip-progress-0> (accessed July 2017).

²¹¹⁴ European Commission, The Twelfth Round of Negotiations for the Transatlantic Trade and Investment Partnership (TTIP), 22-26 February 2016, Public Report–March 2016, 18-19.

²¹¹⁵ See <http://www.transatlantictrade.org/issues/competition-policy/> (accessed July 2017).

²¹¹⁶ Textual Proposal, the European Union's initial proposal for legal text on 'Competition' in TTIP, tabled for discussion with the US in the negotiating round of 10-14 March 2014 and made public on 7 January 2015, http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153029.pdf (accessed July 2017).

²¹¹⁷ Textual Proposal, the European Union's initial proposal for legal text on 'State-owned Enterprises' in TTIP, tabled for discussion with the US in the negotiating round of 14-18 July 2014 and made public on 7 January 2015, http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153030.pdf (accessed July 2017).

would like to discuss the possibility to prohibit certain types of subsidies, such as those given to support insolvent or ailing companies without a credible restructuring plan.²¹¹⁸

1.3.4 Non-EU FTAs

While the focus here is solely on the competition chapters in FTAs concluded by the EU, it is useful to briefly contextualize such agreements in order to better assess the EU's position on the international playing field. One relevant point of comparison are FTAs concluded by the US.

1.3.4.1 US FTAs

From about 2000 the US engaged in 'competitive liberalization' via FTAs as an alternative to multilateral liberalization, de facto forcing the EU to respond. Compared to the US, however, the EU has a more extensive history of including competition chapters in its FTAs.²¹¹⁹ SOKOL described the US' stance on competition chapters in FTAs as one that does not oppose such chapters to the extent that they are non-binding and important to the other party.²¹²⁰

The EU works with an informal template that is tailored to a relatively large extent to the partner country,²¹²¹ also with regard to competition chapters. Some agreements are fairly detailed with regard to the required commitments in the field of competition law, while others simply refer to an undefined notion of 'cooperation'.²¹²² The informal DG COMP templates were renewed in 2012 for competition chapters in future DCFTAs.¹ The US, however, uses the North Atlantic Free Trade Agreement (NAFTA) as a model for all its FTAs. This results in a more structurally standardised scope and a fairly uniform content, based on symmetry and reciprocity.²¹²³ Not all US FTAs contain a competition chapter. Often rather homogenous competition provisions are included in sector-specific chapters such as government procurement or telecommunications services.²¹²⁴

Competition provisions in FTAs can largely be categorized in three sections: those containing procedural commitments, those relating to substantive commitments limited to trade between parties, and provisions proscribing substantive commitments concerning the domestic regime of the parties. EU FTAs were labelled as the main examples of FTAs that provide for substantive

²¹¹⁸ Textual Proposal, the European Union's initial proposal for legal text on 'Subsidies' in TTIP, tabled for discussion with the US in the negotiating round of 10-14 March 2014 and made public on 7 January 2015, http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153031.pdf (accessed July 2017).

²¹¹⁹ S. Woolcock, "European Union policy towards Free Trade Agreements", ECIPE Working paper no. 03/2007, 5.

²¹²⁰ D. D. Sokol, "Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements", *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 258-259.

²¹²¹ S. Woolcock, "European Union Policy towards Free Trade Agreements", ECIPE Working Paper, No. 03/2007, 5.

²¹²² J. Bourgeois, K. Dawar & S. J. Evenett, "A comparative analysis of selected provisions in free trade agreements", Commissioned by DG TRADE, October 2007, <http://www.kamaladawar.com/userfiles/file/downloads/A%20Comparative%20Analysis%20of%20Selected%20FTAs.pdf> (accessed February 2017), 173.

²¹²³ R. Ahearn, "Europe's Preferential Trade Agreements: Status, Content, and Implications", CRS Report for Congress, 3 March 2011, 13.

²¹²⁴ H. Tschaeni & V. Engammare, "The Relationship between Trade and Competition in Free Trade Agreements: Developments since the 1990s and Challenges", *European Yearbook of International Economic Law*, Vol. 4, 2013, 39.

²¹²⁴ R. Ahearn, "Europe's Preferential Trade Agreements: Status, Content, and Implications", CRS Report for Congress, 3 March 2011, 50-51.

commitments and even harmonisation of competition rules of the parties.²¹²⁵ A famous OECD report identified two main families of competition provisions in FTAs, namely EU-style and US-style provisions. The former are more substantive in nature, aimed at harmonization and reform of the domestic competition system, while the latter focus on agency cooperation.²¹²⁶ The EU-Singapore FTA may serve as one example that in EU-style agreements little emphasis is placed on coordination and cooperation provisions. The Agreement only contains a very simple cooperation and coordination clause at the end of the competition chapter.²¹²⁷ The propensity to include comprehensive cooperation provisions can also be observed in FTAs concluded by Japan (see below, Part III, 1.2.4.2).²¹²⁸ The OECD's characterisation has nevertheless been criticised as being overly simplistic, even if the divide was acknowledged by other authors as well.²¹²⁹ Linked to this, it was also found that the EU's FTA extended more frequently and more intensely beyond current WTO obligations than US agreements.²¹³⁰ It is therefore sometimes concluded that the EU uses bilateral trade agreements both to address cross-border enforcement issues and promote fair competition, as well as to disseminate its regulatory model.²¹³¹ The US-Australia FTA serves as an example of the cooperation-focused nature of US-style FTAs. The agreement lacks mutually agreed competition rules beyond vague references regarding anticompetitive practices. Procedural provisions regarding cooperation, however, are far more specific. According to RENNIE, “[c]o-operation on these terms is inherently self-serving; it enhances national enforcement power while preserving the right of each country to pursue its own interests.”²¹³² SEKINE refers to statements of government officials that confirm US prioritisation of cooperation in instances where it has decided to enforce its own competition laws over how other country's competition laws would be enforced in cases of limited market access. This may be explained by the fact that if US industries' export markets are restricted due to anti-competitive practices and the country does not satisfactorily enforce its competition laws, the US will apply its own antitrust laws extraterritorially. In terms of rationale, competition provisions in US FTAs are largely concerned with promoting economic efficiency and consumer welfare, while EU-style competition provisions are included from a market access perspective, and focus more on export interests, externalised for instance in the exemplification of ‘anti-competitive business conduct’, which does not necessarily coincide with promoting economic efficiency or consumer welfare.²¹³³

²¹²⁵ J. Bourgeois, K. Dawar & S. J. Evenett, “A comparative analysis of selected provisions in free trade agreements”, Commissioned by DG TRADE, October 2007, <http://www.kamaladawar.com/userfiles/file/downloads/A%20Comparative%20Analysis%20of%20Selected%20FTAs.pdf> (accessed February 2017), 168.

²¹²⁶ O. Solano & A. Sennekamp, “Competition Provisions in Regional Trade Agreements”, OECD Trade Policy Working Paper Series, Paper No. 31, 2006, COM/DAF/TD(2005)3/FINAL.

²¹²⁷ T. Sekine, “Competition Related Provisions in East Asian FTAs: Their Trends and the Possible Impact of Mega FTAs”, *Chinese (Taiwan) Yearbook of International Law and Affairs*, Vol. 32, No. 86, 2014, 101-102.

²¹²⁸ H. Tschaeni & V. Engammare, “The Relationship between Trade and Competition in Free Trade Agreements: Developments since the 1990s and Challenges”, *European Yearbook of International Economic Law*, Vol. 4, 2013, 59.

²¹²⁹ J. Rennie, “Competition provisions in free trade agreements: unique responses to bilateral needs or derivative developments in international competition policy?”, *International Trade Law & Regulation*, Vol. 15, No. 2, 2009, 57-58. Also see T. Sekine, “Competition Related Provisions in East Asian FTAs: Their Trends and the Possible Impact of Mega FTAs”, *Chinese (Taiwan) Yearbook of International Law and Affairs*, Vol. 32, No. 86, 2014, 87.

²¹³⁰ R. Ahearn, “Europe's Preferential Trade Agreements: Status, Content, and Implications”, CRS Report for Congress, 3 March 2011, 17.

²¹³¹ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 191.

²¹³² J. Rennie, “Competition regulation in SAFTA, AUSFTA and TAFTA: a spaghetti bowl of competition provisions?”, *International Trade Law & Regulation*, Vol. 13, No. 2, 2007, 33. Disclaimer: this document concerned Australian FTAs.

²¹³³ T. Sekine, “Competition Related Provisions in East Asian FTAs: Their Trends and the Possible Impact of Mega FTAs”, *Chinese (Taiwan) Yearbook of International Law and Affairs*, Vol. 32, No. 86, 2014, 103, 106-107.

EU FTAs generally also include a wider range of state aid provisions than their US counterparts, a logical consequence of the fact that the US is less well acquainted with state aid rules.²¹³⁴ US-style FTAs on the other hand have stronger provisions relating to SOEs.²¹³⁵ US-style FTAs also tend to emphasise procedural fairness more in the competition chapter.²¹³⁶ Finally, both EU and US style FTAs typically exclude or limit access to dispute resolution procedures for matters arising in connection to the competition. Often parties are allowed to ‘consult’ on issues arising under the competition chapter.²¹³⁷

Both in the EU’s and the US’ FTAs, competition cooperation provisions have become more important and more detailed, not only in the competition chapter itself, but also in other chapters. This development occurred in parallel with the expansion of the coverage of FTAs, in particular with regard to services, telecommunications or government procurement. In these chapters, EU and US FTAs are more similar than with regard to their competition chapter. This may be explained by the fact that such provisions are similar to those in the WTO, where competition provisions are lacking.²¹³⁸

1.3.4.2 East Asian FTAs

SEKINE engaged in an elaborate study of competition-related provisions in East-Asian FTAs. He concluded that East Asian categories either fall into the category of US- or EU-style FTAs, or form a third, hybrid category. In general, along with the global trend, East Asian FTAs increasingly include competition related provisions, be it in a dedicated chapter or throughout the agreement, although to a varying extent.²¹³⁹ FTAs concluded by China and ASEAN members in particular tend to avoid competition related provisions. According to SEKINE “*this is most likely due to a certain ambivalence toward service trade, government procurement, and intellectual property provisions rather than a lack of interest in promoting competition in those areas*”.²¹⁴⁰ This ‘divide’ among East Asian FTAs likely finds its origins in the ‘hub-and-spoke’ nature to the global web of FTAs and the respective influence of the EU and the US, as well as a similar influence with regard to the development of the East Asian national competition laws as such. SEKINE explains adherence by East Asian countries to US-style FTAs by the fact that the lack of substantive provisions allows the former to save implementation costs and avoid internationally committing to the expanded implementation of their competition laws that would be required under EU-style agreements, while those who do choose to adhere to EU-style FTAs with substantive provisions hope that such international commitments will serve as a catalyst for the

²¹³⁴ J. Bourgeois, K. Dawar & S. J. Evenett, “A comparative analysis of selected provisions in free trade agreements”, Commissioned by DG TRADE, October 2007, <http://www.kamaladawar.com/userfiles/file/downloads/A%20Comparative%20Analysis%20of%20Selected%20FTAs.pdf> (accessed February 2017), 168–169, 183–186.

²¹³⁵ Provisions addressing designated monopolies and state enterprises are generally not excluded from the DSM, in contrast to other competition-related provisions. T. Sekine, “Competition Related Provisions in East Asian FTAs: Their Trends and the Possible Impact of Mega FTAs”, *Chinese (Taiwan) Yearbook of International Law and Affairs*, Vol. 32, No. 86, 2014, 102.

²¹³⁶ Ibid., 103.

²¹³⁷ J. Rennie, “Competition provisions in free trade agreements: unique responses to bilateral needs or derivative developments in international competition policy?”, *International Trade Law & Regulation*, Vol. 15, No. 2, 2009, 67.

²¹³⁸ H. Tschaeni & V. Engammare, “The Relationship between Trade and Competition in Free Trade Agreements: Developments since the 1990s and Challenges”, *European Yearbook of International Economic Law*, Vol. 4, 2013, 59–60.

²¹³⁹ T. Sekine, “Competition Related Provisions in East Asian FTAs: Their Trends and the Possible Impact of Mega FTAs”, *Chinese (Taiwan) Yearbook of International Law and Affairs*, Vol. 32, No. 86, 2014, 100.

²¹⁴⁰ Ibid.

introduction, establishment, or development of national competition laws. As a final factor of influence SEKINE identifies the emergence of mega-FTAs.²¹⁴¹

When zooming in on two major Asian players, Japan and China, the following characteristics can be discerned. Japan increasingly includes sophisticated competition provisions in its FTAs. A majority of the latter contains competition chapters. The content is relatively consistent. Chinese FTAs on the other hand until recently did not contain competition chapters. The Switzerland-China and Iceland-China agreements that entered into force in 2014 each contain a competition law chapter consisting of one article.²¹⁴² The 2015 China-Korea FTA is the first one containing a sizeable competition chapter. The lack of competition chapters does not mean, however, that earlier Chinese FTAs did not contain competition law related provisions. Generally competition law issues are included in the chapter relating to cooperation, even if there is no stand-alone clause addressing such issues. Other competition related provisions can be found in the chapters dealing with services, government procurement, and intellectual property.²¹⁴³

1.3.5 Observations

1.3.5.1 Evolution in the competition provisions of EU FTAs

One evolution that can be seen between traditional FTAs and post-Global-Europe FTAs is the increased role of substantive provisions in the latter category as compared to cooperation or

²¹⁴¹ Ibid., 112, 114.

²¹⁴² Switzerland-China FTA: “CHAPTER 10 COMPETITION - ARTICLE 10 *Competition*:

1. *Anticompetitive practices, such as agreements between undertakings that may prevent or restrict competition, abuse of a dominant market position and concentrations of undertakings which may have the effect of prevention or restriction of competition may cause adverse effects on the bilateral trade, and thereby hinder the functioning of this Agreement. The Parties undertake to apply their respective competition laws in that regard.*

2. *This Chapter applies to all undertakings of the Parties. Such application shall not hinder undertakings with special and exclusive rights authorised by laws and regulations from exercising those rights.*

3. *Nothing in this Chapter creates any legally binding obligations for the undertakings or intervenes with the independence of the competition authorities in enforcing their respective competition laws.*

4. *Cooperation between the competition authorities of the Parties may have a significant effect on the enforcement of competition laws in matters affecting trade between the Parties. The competition authorities of the Parties shall cooperate with regard to anticompetitive practices.*

5. *If a Party considers that a given practice continues to affect trade in the sense of paragraph 1, it may request consultations in the Joint Committee with a view to facilitating a resolution of the matter.*

6. *Chapter 15 shall not apply to this Chapter.”*

Iceland-China FTA: “CHAPTER 5 COMPETITION Article 62 *Rules of Competition*:

1. *The Parties recognise that anti-competitive business conduct may frustrate the benefits arising from this Agreement. Such conduct is therefore incompatible with the proper functioning of this Agreement in so far as it may affect trade between the Parties.*

2. *This Chapter also applies to undertakings with privilege and exclusive rights authorised by law. Such application shall not prevent the above undertakings from fulfilling their legal functions.*

3. *The provisions of this Chapter shall not be construed to create any legally binding obligations for the undertakings and are also without prejudice to the independence of the Parties’ competition authorities according to their respective competition laws.*

4. *The Parties undertake to apply their respective competition laws with a view to removing anti-competitive business conduct. The co-operation between the Parties may include the exchange of information in accordance with the respective laws and regulations of the Parties, as well as their confidentiality obligations.*

5. *The competition authorities of the Parties shall co-operate and consult on matters pertaining to this Chapter.*

6. *Any dispute under this Chapter shall be settled through consultation between the Parties. Neither Party may have recourse to dispute settlement mechanism under this Agreement in respect of any issue arising from or relating to this Chapter.”*

²¹⁴³ T. Sekine, “Competition Related Provisions in East Asian FTAs: Their Trends and the Possible Impact of Mega FTAs”, *Chinese (Taiwan) Yearbook of International Law and Affairs*, Vol. 32, No. 86, 2014, 88- 95.

procedural clauses. An overarching feature of these more recent FTAs is indeed that substantive provisions such as the requirement to maintain competition laws and (an efficient) competition authority, rules on state monopolies, state enterprises and enterprises entrusted with special rights, as well as adherence to the principles of transparency, non-discrimination, and due process, have complemented cooperation provisions. This is in line with the aim of greater convergence expressed in the Global Europe strategy. The importance of such competition principles, in particular in relations with parties that do not have a long experience of enforcing competition laws, is increasingly being recognised in multilateral forums such as the ICN.²¹⁴⁴

Some claim that there is little variation in the rules included in the EU's DCFTAs, in particular with regard to the offensive interests of the EU. They conclude from this that there is not really a process of dialogue preceding this inclusion, but that it is rather the consequence of a recognition by the EU's trade partners that this is the price to pay for enhanced market access.²¹⁴⁵ Nevertheless, with regard to the competition law chapters, the post-Global-Europe FTAs that were analysed are very diverse. The agreements with Moldova, Georgia and Ukraine can hardly be compared. The DCFTA with Ukraine is quite particular, and also has great strategic value due to the particular geopolitical position of Ukraine, explaining the enhanced focus on approximation. It should be noted that a certain amount of tailoring is desirable, but there should be some level of consistency throughout to convey a clear message.

Overall a significant simplification has taken place in the sense that listings have generally been replaced by general descriptions. Details on cooperation actions are no longer set in the agreement in order to cover as much ground as possible. In particular, what exactly cooperation on a policy and case level implies is no longer specified. What could be considered to be negative and positive comity type-provisions have been omitted. While on the one hand this provides more freedom to the parties, one might wonder on the other hand whether parties would not benefit from somewhat more guidance in an interpretative annex for instance. Another example of this 'streamlining' is that the aim and use of consultations is stated, but the concrete implementation is left to the parties. A possible downside then is that parties are no longer enticed to engage in requested consultations as soon as possible ('promptly'), nor are they guided in what information should be mentioned in a request.

Some claim that the rhetoric of the EU regarding the importance of competition policy in the context of its trade relations, is not reflected in the competition chapters of its DCFTAs. There is not always a straightforward obligation to apply national competition rules in a non-discriminatory manner, and often no clear prohibition of a listed set of anti-competitive practices. EU DCFTAs often limit themselves to stating that certain activities restricting competition are incompatible with the proper functioning of the agreement, sometimes only insofar as they may affect trade between the parties and not in general, regardless of an effect on trade.²¹⁴⁶ Often the parties are simply asked to maintain effective domestic laws, leaving a lot of leeway to the signatories. A binding obligation to

²¹⁴⁴ J. Bourgeois, K. Dawar & S. J. Evenett, "A comparative analysis of selected provisions in free trade agreements", Commissioned by DG TRADE, October 2007, <http://www.kamaladawar.com/userfiles/file/downloads/A%20Comparative%20Analysis%20of%20Selected%20FTAs.pdf> (accessed February 2017), 176.

²¹⁴⁵ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 236.

²¹⁴⁶ Ibid., 195; H. Tschaeni & V. Engammare, "The Relationship between Trade and Competition in Free Trade Agreements: Developments since the 1990s and Challenges", *European Yearbook of International Economic Law*, Vol. 4, 2013, 59.

apply the respective competition laws in a non-discriminatory and transparent manner is also frequently lacking, with the parties merely ‘recognising the importance’ of doing so. The parties therefore are only subject to best endeavour obligations.²¹⁴⁷ On the other hand, it must be stated that the EU’s FTAs do go beyond provisions regarding hard core cartels, and also include other anti-competitive practices. In this sense they go beyond what the EU wished to include in the WTO-framework.²¹⁴⁸ In short, while the scope is relative broad, the content of the provisions is rather limited.²¹⁴⁹ Not only EU FTAs have been reproached of having weak content. The South-Asian Free Trade Area, the Australia-US FTA, and the Transatlantic Free Trade Area all have been accused of containing general platitudes about the desirability of competition law and regulating anti-competitive business practices via declarations of intent.²¹⁵⁰

1.3.5.3 Unenforceability: exclusion from the Dispute Settlement Mechanism

A dispute settlement mechanism offers several benefits. First of all, it helps interpret an agreement and reduce uncertainty about its content, in particular when dealing with complex issues where there is more scope for measures that fall in a grey zone between the straightforward allowed and straightforward illegal. In this way, the expectations of the parties may be aligned. In case adjudication is necessary, this can take place according to an agreed-upon procedure. Adjudication, or even the mere threat of it, may have strong reputational consequences.²¹⁵¹ SOKOL claims that “[t]he general perception of adjudication is that it creates compliance merely because of the threat of potential use.”²¹⁵² According to international relations literature a formal DSM may increase enforcement of the agreement as it assists instilling a sense of ‘international obligation’ in the parties.²¹⁵³

An obvious downside of negotiating a DSM is the complexity it may bring to the negotiations, and the administrative cost of setting up the mechanism. A DSM is generally an issue of contention as it is likely to have a large case-load, due to the fact many provisions in and FTA are more or less unspecified, and it is likely to shape the practical ambit of the agreement to a large extent. Others have warned that it may weaken the forces maintaining system integrity. The reputational cost to the losing respondent is not compensated for by an equal gain for the other party, which results in net joint costs to the members of the agreement. The gains from situations whereby naming and

²¹⁴⁷ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 195, 197.

²¹⁴⁸ S. J. Evenett, “What can we really learn from the competition provisions of regional trade agreements?”, 23 August 2005, available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.583.9612&rep=rep1&type=pdf> (accessed February 2017), 6.

²¹⁴⁹ J. Bourgeois, K. Dawar & S. J. Evenett, “A comparative analysis of selected provisions in free trade agreements”, Commissioned by DG TRADE, October 2007, <http://www.kamaladawar.com/userfiles/file/downloads/A%20Comparative%20Analysis%20of%20Selected%20FTAs.pdf> (accessed February 2017), 171. The scope in this context refers to the question of whether the competition provisions define the anti-competitive conduct they address and if so, what types of anti-competitive conduct, while the content refers to the procedural and substantive obligations these provisions entail with respect to the types of anti-competitive conduct.

²¹⁵⁰ J. Rennie, “Competition regulation in SAFTA, AUSFTA and TAFTA: a spaghetti bowl of competition provisions?”, *International Trade Law & Regulation*, Vol. 13, No. 2, 2007, 32.

²¹⁵¹ H. Horn and P. Mavroidis, “International trade: dispute settlement” in A. Guzman and A. Sykes (eds), *Research handbook in international economic law*, Cheltenham, Edward Elgar Publishing, 2007, 185-187.

²¹⁵² D. D. Sokol, “Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements”, *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 260. It should be mentioned that Sokol’s study focuses on Latin American FTAs, but the conclusions are generalizable.

²¹⁵³ H. Horn and P. Mavroidis, “International trade: dispute settlement” in A. Guzman and A. Sykes (eds), *Research handbook in international economic law*, Cheltenham, Edward Elgar Publishing, 2007, 186.

shaming leads to situations where members abide by the agreement where they otherwise would not have, must be weighed against the costs of cases where there is no compliance in any event. The cost of having a DSM may moreover be disproportionate, as parties realise that they may either be complainant or the respondent and therefore will not set punishments at a deterring level.²¹⁵⁴

A) EU- versus other FTAs: competition chapters (near-)universally excluded

While it is generally considered that competition policy chapters in FTAs are binding, this is not actually the case in the facts. One feature common to all recent FTAs under scrutiny is that the competition provisions are almost consistently excluded from the dispute settlement mechanism (DSM), with the exception of some provisions on subsidies.²¹⁵⁵ The reason why a distinction is made in this regard between competition provisions and subsidies provisions, relates to the fact that the EU Courts have exclusive competence to review the European Commission's antitrust and merger decisions, on the one hand, while on the other hand, in the context of the WTO SCM Agreement, dispute settlement arrangements already exist.²¹⁵⁶ This observation does not only apply to FTAs concluded by the EU. In the US the DSM generally only applies to practices for which the state as the contracting party can be held accountable to a greater or lesser extent, such as the practices of monopolies and state-owned enterprises, or violations of transparency obligations.²¹⁵⁷

B) Why competition law is different than other chapters, and therefore excluded

This exclusion is quite striking because it contrasts with other chapters in FTAs dealing with behind-the-border policies, such as chapters on services and intellectual property, even if such chapters actually contain some competition elements. One main difference between competition policy and other areas of domestic regulation is that the WTO covers most of the latter issues under the General Agreement for Trade in Services and the Agreement on Trade-Related Aspects of Intellectual Property Rights. For such issues the backstop of WTO-level commitments and dispute resolution exists. It is in contrast as well with earlier work on the use of dispute settlement in international agreements, which finds that as a problem covered by an international agreement grows more complex, its chances of being included in a dispute settlement mechanism grow as well.²¹⁵⁸ According to SOKOL, this exclusion “*has created soft law within the guise of a hard law agreement.*”²¹⁵⁹

The choice to exclude competition chapters from dispute settlement mechanisms is indeed surprising and requires clarification, as FTAs constitute full-fledged international treaties subject to burdensome procedures.²¹⁶⁰ In the EU they are negotiated and concluded under article 207 TFEU. Additional legal bases of these agreements may be necessary depending on the content of the FTA's, which can be quite varied. In case trade in services or commercial aspects of intellectual property rights are included, unanimity of the Council is required apart from the consent of the European

²¹⁵⁴ Ibid., 184-189.

²¹⁵⁵ The EU-Mexico FTA is an example where the DSM seems to include competition.

²¹⁵⁶ Interview of Johannes Laitenberger by François-Charles Laprévotte, *Concurrences Review*, mailing 12 April 2016.

²¹⁵⁷ H. Tschaeni & V. Engammare, “The Relationship between Trade and Competition in Free Trade Agreements: Developments since the 1990s and Challenges”, *European Yearbook of International Economic Law*, Vol. 4, 2013, 58.

²¹⁵⁸ D. D. Sokol, “Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements”, *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 234, 254-255, 257.

²¹⁵⁹ Ibid., 256.

²¹⁶⁰ R. Ahearn, “Europe's Preferential Trade Agreements: Status, Content, and Implications”, CRS Report for Congress, 3 March 2011, 3.

Parliament.²¹⁶¹ Furthermore, sometimes elements are included in an FTA that constitute a competence of the member states, which can cause FTA's to become mixed agreements (see below, Part III, 1.4.2.4).²¹⁶² The question therefore poses itself why such chapters are included in the first place (see below, Part III, 1.3.1).²¹⁶³

a. The means are unsuited for the end

A first reason why competition provisions are excluded from dispute settlement, is that such conflict-resolution is simply not suited to reach what the provisions set forth. Competition chapters in FTAs may for instance aim to increase cooperation among competition agencies by creating space for and add legitimacy to repeat interaction. In such a situation formal dispute resolution does not add to this goal. Even more, such repeat interaction may in turn lead to the resolution of substantive competition law issues, decreasing the need for formal dispute-resolution even more. In an area in which cooperation and coordination between agencies is necessary, the legal battles that may occur within more formalized institutions dealing primarily with trade remedies might force agencies to side with their countries which in turn could create ill will between agencies. Another goal of the inclusion of competition chapters is to symbolically indicate the importance of competition and thereby create a certain reputational and branding effect. In this case as well, a lack of formal enforcement of competition policy chapters through adjudication does not detract from its value. Parties that do not comply with the commitments made in the agreement may suffer certain reputational effects, which may for instance result in unwillingness to enter into future agreements with that party. As such, mere reputational effects and social pressure, or 'relational contracting' can

²¹⁶¹ Art. 207(4) TFEU.

²¹⁶² For instance, the KOREU FTA included a protocol related to cultural matters, making it a mixed agreement. "*Mixed agreements are agreements to which both the EU and the member states are contracting parties on the basis that their joint participation is required, because not all matters covered by the agreement fall exclusively within EU competence or exclusively within member state competence.*" P. Craig & G. de Búrca, *EU Law - Text, Cases and Materials*, 5th ed., Oxford, Oxford University Press, 2011, 334. This is a very basic description of what is in fact a very complex matter. For more information, see C. Hillion & P. Koutrakos (eds), *Mixed Agreements Revisited*, Oxford, Hart Publishing, 2010.

²¹⁶³ While the exclusion of competition chapters from dispute settlement is rather straightforward in the Post-Global-Europe FTAs, this is not the case in the 'traditional' FTAs. However, even if competition is not entirely excluded from the DSM, the application is often somewhat problematic. For instance, in the FTA with South Africa, which contains rather detailed and strict provisions on dispute settlement, in particular for trade or trade-related issues (including the clauses on competition), parties may take 'appropriate measures' if a practice is deemed incompatible with the agreement, but no further definitions are provided. The Agreement moreover explicitly recognizes the competence of both competition authorities to act, making it unclear how dispute settlement would apply. Finally, the Agreement does not define what happens in case a party does not comply with a Council decision. (J. Bourgeois, "Competition Policy: the Poor Relation in the European Union Free Trade Agreements" in I. Govaere, E. Lannon, P. Van Elsuwege & S. Adam (eds), *The European Union in the World – Essays in honour of Marc Maresceau*, Leiden/Boston, Martinus Nijhoff Publishers, 2014, 390–391, 395. Also see A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 139.) Joint Council decision 2/2000 accompanying the EU-Mexico FTA equally introduces a rather sophisticated DSM that also applies to the provisions on competition law. Annex XV to this Joint Council Decision, however, establishes a cooperation and coordination mechanism among the states' competition authorities, including the possibility for consultations when an investigation is considered to affect the interest of the other party. This emphasis on cooperation and coordination is reiterated in Article 7. BOURGEOIS deduced from this that "*even though no express prohibition on the use of the arbitration procedure in this case exists, the generally worded co-operation provisions are regarded in practice as not legally binding by state officials*". (J. Bourgeois, "Competition Policy: the Poor Relation in the European Union Free Trade Agreements" in I. Govaere, E. Lannon, P. Van Elsuwege & S. Adam (eds), *The European Union in the World – Essays in honour of Marc Maresceau*, Leiden/Boston, Martinus Nijhoff Publishers, 2014, 390–391) Similarly to the EU-South Africa agreement, the EU-Mexico Agreement does not define what happens in case a party does not comply with a Council decision. (Ibid., 390–391, 395. Also see A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 139.)

lead to credible commitments without having to result to ‘formal contracting’. When looking at international competition enforcement as a repeat game in which the number of repetitions is unknown and the discount rate is low, in a game theory model, the optimal strategy consists of cooperation.²¹⁶⁴ Additionally, competition law mainly addresses private behaviour rather than public behaviour, while trade law is generally geared towards government restraints. Dispute resolution among states is therefore not useful.

b. A priori unenforceable provisions

One could say that competition provisions in FTAs are not enforceable because they are excluded from the DSM. However, one could also reverse the causality, and claim that the provisions are excluded *because* they are inherently unenforceable. The main factor explaining the exclusion of competition chapters from the FTA DSMs is perhaps simply the fact that while technically competition-related obligations in an FTA may be binding, they may nevertheless be unenforceable.²¹⁶⁵ ARAUJO finds that there is “*an apparent gap between the EU’s rhetoric, which emphasizes the importance of linking trade and competition policy, and the reality of the EU’s external trade practice in the EU DCFTAs,*” evidenced by the fact that even though the TFEU competition rules have to a certain extent inspired the EU DCFTAs, most provisions are worded in general and unenforceable terms.²¹⁶⁶

Some interpret the exclusion from the DSM as evidence that competition chapters merely contain ‘best endeavour’ commitments.²¹⁶⁷ In this case, there is indeed not much to gain from “*arbitrating ‘best endeavour’ principles that merely encourage the application of effective domestic competition laws or cooperation principles*”.²¹⁶⁸ Many of the competition provisions in EU FTAs do not lend themselves to dispute settlement proceedings as they are too vague or enforcement is difficult to monitor.²¹⁶⁹ Norms of aspiration and norms of obligation are mixed, and the level of precision of the obligations varies considerably as well.²¹⁷⁰ Many of the competition-related obligations in FTAs are not normative and do not proscribe clear standards or procedures, leaving many aspects open to interpretation. This in turn renders the establishment of non-compliance to be problematic. One could consider the competition chapters in the EU’s FTAs as ‘framework laws’, often characterised by declarations of

²¹⁶⁴ D. D. Sokol, “Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements”, *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 260, 265-266, 270, 281.

²¹⁶⁵ J. Bourgeois, “Competition Policy: the Poor Relation in the European Union Free Trade Agreements” in I. Govaere, E. Lannon, P. Van Elsuwege & S. Adam (eds), *The European Union in the World – Essays in honour of Marc Maresceau*, Leiden/Boston, Martinus Nijhoff Publishers, 2014, 396.

²¹⁶⁶ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 180.

²¹⁶⁷ J. Bourgeois, “Competition Policy: the Poor Relation in the European Union Free Trade Agreements” in I. Govaere, E. Lannon, P. Van Elsuwege & S. Adam (eds), *The European Union in the World – Essays in honour of Marc Maresceau*, Leiden/Boston, Martinus Nijhoff Publishers, 2014, 394.

²¹⁶⁸ Ibid., 392, footnote 56. On the debate on the qualification of obligations as hard or soft law, see V. Demedts, *La coopération internationale entre les autorités de concurrence: ‘Entre le marteau et l’enclume’?* *Revue de l’Union européenne*, Vol. 575, No. 2, 2014, 101-109.

²¹⁶⁹ J. Bourgeois, K. Dawar & S. J. Evenett, “A comparative analysis of selected provisions in free trade agreements”, Commissioned by DG TRADE, October 2007, <http://www.kamaladawar.com/userfiles/file/downloads/A%20Comparative%20Analysis%20of%20Selected%20FTAs.pdf> (accessed February 2017), 182. Also see J. Rennie, “Competition provisions in free trade agreements: unique responses to bilateral needs or derivative developments in international competition policy?”, *International Trade Law & Regulation*, Vol. 15, No. 2, 2009, 67.

²¹⁷⁰ On this matter, see J. Bourgeois, “Competition Policy: the Poor Relation in the European Union Free Trade Agreements” in I. Govaere, E. Lannon, P. Van Elsuwege & S. Adam (eds), *The European Union in the World – Essays in honour of Marc Maresceau*, Leiden/Boston, Martinus Nijhoff Publishers, 2014, 391-394.

intent, sometimes expanded on with vague standards and generalised clauses. While allowing maximum flexibility and responsiveness, they are inherently discretionary.²¹⁷¹ In this context CERNAT, after noting that there was no reliable information available on whether competition chapters in FTAs make a difference, came to the conclusion that the parties to FTAs seem more eager to conclude such agreements, rather than to implement them.²¹⁷²

The fact that competition provisions are generally unenforceable does not in itself however provide justification for the exclusion from the DSM. The Bruegel study ‘Beyond the WTO? An anatomy of EU and US preferential trade agreements’, found that EU FTAs scored lower than US FTAs with regard to the enforceability of their WTO-extra provisions, even if generally the EU agreements contain a larger number of such provisions. In US Agreements the exemption of competition-related disciplines from dispute settlement was identified as the main source of non-enforceability. In total, the study found only 13% of the covered US provisions to be non-enforceable, compared to nearly 75% of provisions in EU agreements.²¹⁷³ Not all of these ‘unenforceable’ provisions in EU FTAs are then automatically excluded from the DSM.

c. Trade is not the same as competition

When the EU suggested dispute settlement for competition matters within the context in the WTO, the fear existed that WTO panels would be empowered to undermine the decisions, and thereby the prosecutorial discretion, of national competition authorities and courts. It was never the intention of the EU, however, to provide panels with the power to second-guess individual decisions. The panels would rather focus exclusively on whether the legislation and enforcement structure of a member are in accordance with its WTO commitments and on cases where a ‘pattern of non-enforcement’ could be identified. These intentions, however, did not remove the doubts regarding the risk that such an arrangement could eventually dominate domestic competition laws.²¹⁷⁴ It was confirmed by DG COMP officials that it is a politically highly sensitive issue.²¹⁷⁵ The same rationale can be discerned with regard to the exclusion of competition chapters from the DSM in bilateral FTAs, in that those provisions should not impinge on the competence of the competition authorities to decide on the anti-competitive nature of a given practice. Moreover, in comparison to trade law, competition law is a relatively new policy field for many jurisdictions, which may also add to the fact that there is wariness from those partner countries towards hard adjudication.²¹⁷⁶ Equally, the lack of existing international minimum rules means that the barrier to give up sovereignty is higher than if there was

²¹⁷¹ J. Rennie, “Competition regulation in SAFTA, AUSFTA and TAFTA: a spaghetti bowl of competition provisions?”, *International Trade Law & Regulation*, Vol. 13, No. 2, 2007, 32, 35.

²¹⁷² L. Cernat, “Eager To Ink But Ready To Act? RTA Proliferation and International Cooperation on Competition Policy” in A.M. Alvarez & L. Cernat (eds) *Trade and Competition Issues: experiences at regional level*, UNCTAD, as mentioned in P. Holmes, A. Papadopoulos, B. Özgür Kayali & A. Sydorak, “A Taxonomy of International Competition Cooperation Provisions”, paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 6-7.

²¹⁷³ H. Horn, P. Mavroidis & A. Sapir, “Beyond the WTO? An anatomy of EU and US preferential trade agreements”, Bruegel Blueprint Series, Vol. VII, 2009, 25.

²¹⁷⁴ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 187-188.

²¹⁷⁵ Interview with Commission officials.

²¹⁷⁶ H. Tschaeni & V. Engammare, “The Relationship between Trade and Competition in Free Trade Agreements: Developments since the 1990s and Challenges”, *European Yearbook of International Economic Law*, Vol. 4, 2013, 62.

already some sort of international base-line representing some form of substantive convergence.²¹⁷⁷ If there was such an agreement, the cost of a binding commitment would decrease as it would likely represent a smaller departure from the domestic system.²¹⁷⁸

Apart from the consequences for sovereignty from the submission to a DSM as such, the members composing the panels under such mechanisms may cause apprehension as well. Such panels will predominantly consist of trade experts. The latter may have a different approach and pursue different goals (see below, Part III, 1.3.2.2). While antitrust and international trade have overlapping concerns, they nevertheless remain distinct. Trade experts may focus more on producer welfare rather than efficiency concerns, which may lead competition authorities to be reluctant to let trade experts decide on antitrust matters and prefer that cross-border antitrust disputes are resolved via discussions at the inter-agency level, where agencies speak a similar language.²¹⁷⁹

D) Consultations

The alternative for conflict-resolution via formal dispute settlement is often found in the form of consultations between the parties.²¹⁸⁰ In earlier EU FTAs such consultations took place in Joint Committees with the clear objective of reaching a solution to the problem related to the competition provisions, while more recent EU FTAs as well as US FTAs generally provide in general terms for consultations to foster understanding between the parties and address specific matters, sometimes underlining the autonomy of the parties regarding the final decision on the issues subject to consultations.²¹⁸¹

The consultations procedure is not seen as a second best solution. From negotiating drafts of EU FTAs is apparent that it is explicit EU policy to subject disagreements relating to competition law provisions to non-binding consultation procedures. It is not against the will of the EU that competition law is kept outside of the DSM, even if it advocated such a situation in the past. During the CETA-negotiations, Canada even advocated including the competition chapter under the DSM, but the EU stressed that competition issues should only be subject to consultations. In the final version of the Agreement there is even no mention whatsoever of a consultation procedure for issues arising under the competition chapter (apart from subsidies).²¹⁸²

The submission of competition issues to a consultation procedure does create some problems, however. As competition provisions may be spread throughout one agreement, both inside as well as

²¹⁷⁷ D. D. Sokol, "Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements", *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 260-261.

²¹⁷⁸ J. Bourgeois, "Competition Policy: the Poor Relation in the European Union Free Trade Agreements" in I. Govaere, E. Lannon, P. Van Elsuwege & S. Adam (eds), *The European Union in the World – Essays in honour of Marc Maresceau*, Leiden/Boston, Martinus Nijhoff Publishers, 2014, 393.

²¹⁷⁹ D. D. Sokol, "Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements", *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 265.

²¹⁸⁰ See J. Bourgeois, K. Dawar & S. J. Evenett, "A comparative analysis of selected provisions in free trade agreements", Commissioned by DG TRADE, October 2007, <http://www.kamaladawar.com/userfiles/file/downloads/A%20Comparative%20Analysis%20of%20Selected%20FTAs.pdf> (accessed February 2017), 182.

²¹⁸¹ H. Tschaeni & V. Engammare, "The Relationship between Trade and Competition in Free Trade Agreements: Developments since the 1990s and Challenges", *European Yearbook of International Economic Law*, Vol. 4, 2013, 58. See for instance the EU-Colombia-Peru(-Ecuador) FTA.

²¹⁸² B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 197.

outside of the competition chapter, for instance in sector-specific chapters, it may occur that the competition chapter is excluded from the dispute settlement procedures but the sector-specific chapter is not. The question then arises whether the other party should then have recourse to dispute settlement, or first allow consultations between competition authorities. This situation is generally not addressed by FTAs. One exception is the US-Singapore FTA, which states, with regard to the telecommunications services chapter, that when there is an inconsistency with another chapter, the telecommunications chapter shall override the other chapter to the extent of the inconsistency.²¹⁸³

1.4 The rationale for inclusion: pro's and con's

The increased awareness of the importance of competition provisions has resulted in a growing emphasis on such provisions in FTAs. Many scholars claim that the main determinant for the inclusion of a competition chapter in an FTA, as well as a predictor of the success of such a chapter, seems to be the absence or presence of antitrust laws in the legal system of both parties at the time of concluding the agreement.²¹⁸⁴ A study by GERADIN and PETIT confirmed that it is not so much the text of the agreement that determines its functioning as whether or not there is an operational competition authority present.²¹⁸⁵ BOURGEOIS as well asserts that even though all recent bilateral FTAs concluded by the EU include competition provisions, the degree of detail seems to vary along the trading partners' domestic competition legislation, combined with the occurrence and level of enforcement institutions and regulating bodies.²¹⁸⁶ This is rather evident. Cooperation provisions or provisions demanding that a competition law system adopts certain qualities would be of little use if the partner country does not have competition rules to begin with.²¹⁸⁷ An additional factor is whether or not parties to the FTA have concluded competition agreements outside FTAs, affecting the need, nature and urgency of competition provisions in FTAs.

1.4.1 The different roles of competition chapters in FTAs

There is much debate about the role of competition provisions in FTAs, because little is known about their functioning, and it is difficult to establish causality.²¹⁸⁸ Only very few studies exist on the

²¹⁸³ H. Tschaeni & V. Engammare, "The Relationship between Trade and Competition in Free Trade Agreements: Developments since the 1990s and Challenges", *European Yearbook of International Economic Law*, Vol. 4, 2013, 63.

²¹⁸⁴ D. D. Sokol, "Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements", *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 256.

²¹⁸⁵ D. Geradin & N. Petit, "Competition policy in the Southern mediterranean Countries", *Review of Network Economics*, Vol. 3, No. 1, March 2004, as mentioned in P. Holmes, A. Papadopoulos, B. Özgür Kayali & A. Sydorak, "A Taxonomy of International Competition Cooperation Provisions", paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 6.

²¹⁸⁶ J. Bourgeois, "Competition Policy: the Poor Relation in the European Union Free Trade Agreements" in I. Govaere, E. Lannon, P. Van Elsuwege & S. Adam (eds), *The European Union in the World – Essays in honour of Marc Maresceau*, Leiden/Boston, Martinus Nijhoff Publishers, 2014, 382. J. Bourgeois, K. Dawar & S. J. Evenett, "A comparative analysis of selected provisions in free trade agreements", Commissioned by DG TRADE, October 2007, <http://www.kamaladawar.com/userfiles/file/downloads/A%20Comparative%20Analysis%20of%20Selected%20FTAs.pdf> (accessed February 2017), 188-189. S. Szepesi, "Comparing EU free trade agreements – Competition policy and state aid", *InBrief, European Centre for Development Policy Management*, No. 6E, July 2004, 5.

²¹⁸⁷ J. Bourgeois, K. Dawar & S. J. Evenett, "A comparative analysis of selected provisions in free trade agreements", Commissioned by DG TRADE, October 2007, <http://www.kamaladawar.com/userfiles/file/downloads/A%20Comparative%20Analysis%20of%20Selected%20FTAs.pdf> (accessed February 2017), 169, 188-189.

²¹⁸⁸ *Ibid.*, 47.

actual effects of certain behind-the-border aspects of FTAs, including competition and state aid.²¹⁸⁹ In 2007, the ICN found that only very few of the respondents replying to their questionnaire on cooperation between competition agencies in cartel cases reported any examples of cooperation based on the competition provisions in FTAs, causing them to conclude that competition chapters in FTAs seem to have played only a limited role in such cooperation efforts.²¹⁹⁰ Nevertheless, a few rationales for their inclusion may be discerned.

1.4.1.1 Support trade enhancing objectives and avoid the undermining of trade liberalization

Competition provisions are generally not included in an FTA for their intrinsic value. The most straightforward reason to include competition law provisions in a trade agreement is, as mentioned, that negotiators of FTAs are aware of the fact that the benefits of trade liberalization can be undone by private anti-competitive practices, and recognize the need to adequately address such actions, thereby guaranteeing that such private barriers do not undermine the removal of public restraints to local market access.²¹⁹¹ Competition is a powerful policy instrument able to shape the structure and operation of market economies.²¹⁹² Moreover, the development of economic efficiency and consumer welfare that comes along with competition laws contributes to the overall aim of trade liberalization.²¹⁹³ This explains why the inclusion of competition provisions in an FTA is most often justified as a measure to support the trade enhancing objectives of the agreement. It aims to harness the potential synergies between trade and competition policy, and contributes a more just ‘balance’ in trade agreements between the rights of producers and the protection of consumers and other members of society.²¹⁹⁴ Moreover, the inclusion of competition policy suits the aim of DCFTAs to create a true and encompassing ‘economic partnership’.²¹⁹⁵

1.4.1.2 Symbolic value

As discussed, competition chapters are typically excluded from the dispute settlement mechanism included in an FTA. Why then, do countries spend time and resources in negotiating such chapters? The answer may lie in their symbolic value in promoting pro-competitive reform and a ‘competition culture’. This message may be addressed both to foreign investors, indicating that regulatory

²¹⁸⁹ For references, see J. Bourgeois, K. Dawar & S. J. Evenett, “A comparative analysis of selected provisions in free trade agreements”, Commissioned by DG TRADE, October 2007, <http://www.kamaladawar.com/userfiles/file/downloads/A%20Comparative%20Analysis%20of%20Selected%20FTAs.pdf> (accessed February 2017), 206-207.

²¹⁹⁰ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 15.

²¹⁹¹ S. J. Evenett, “What can we really learn from the competition provisions of regional trade agreements?”, 23 August 2005, available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.583.9612&rep=rep1&type=pdf> (accessed February 2017), 4, 14.

²¹⁹² A. Bradford & T. Büthe, “Competition policy and free trade – Antitrust provisions in PTAs” in A. Dür, M. Elsig (eds), *Trade cooperation – the purpose, design and effects of preferential trade agreements*, Cambridge, Cambridge University Press, 2015, 247.

²¹⁹³ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 182.

²¹⁹⁴ J. Bourgeois, K. Dawar & S. J. Evenett, “A comparative analysis of selected provisions in free trade agreements”, Commissioned by DG TRADE, October 2007, <http://www.kamaladawar.com/userfiles/file/downloads/A%20Comparative%20Analysis%20of%20Selected%20FTAs.pdf> (accessed February 2017), 168.

²¹⁹⁵ S. J. Evenett, “What can we really learn from the competition provisions of regional trade agreements?”, 23 August 2005, available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.583.9612&rep=rep1&type=pdf> (accessed February 2017), 4.

liberalization and a competitive environment are considered important, as well as to the domestic institutions and the general population.²¹⁹⁶ RENNIE, referring to REUTER, points to the distinction between the legal and sociological aspects of a treaty, whereby “*The significance of the competition provisions cannot be judged from their effects in law alone. [...] They need to be looked at through the paradigm of international law (rather than a more ‘legalist paradigm’).*”²¹⁹⁷ Aspirational statements in international agreements may in this way create compliance by helping to shape and implement norms.²¹⁹⁸

1.4.1.3 Facilitate relations between competition authorities

The inclusion of competition chapters in an FTA may create opportunities for direct contact between antitrust agency staff, to develop personal and institutional ties. It may promote (voluntary) cooperation between the competition agencies of participating parties. According to HOLMES, PAPADOPOULOS, KAYALI and SYDORAK, cooperation between EU and South African competition agencies for instance functioned relatively well, but the intensity depended entirely on particular individuals. Research from 2005 showed that only one person in the South African Competition Commission had personal ties with a colleague in Brussels and that in the absence of a formal cooperation arrangement those were the only two people among which contact would be possible. From this perspective, a formal agreement facilitates (informal) relations between all officials involved.²¹⁹⁹ FTAs in this sense offer a proper basis to cooperate and function as a catalyst, without which some agencies would not engage.²²⁰⁰ This is particularly useful for less experienced competition authorities, with whom no dedicated competition cooperation agreement would be concluded. It is therefore important that the implementation of such agreements is well-documented, to provide empirical evidence for such statements.

1.4.1.4 Circumvent deadlock in multilateral or regional negotiations and precedent setting

Some claim that the EU attempts to do in bilateral FTAs what it could not accomplish at the WTO.²²⁰¹ FTAs then represent the ‘best alternative to a negotiated multilateral agreement’. FTAs may be strategically cultivated by states to enhance this best alternative, and therefore also their leverage in multilateral negotiations.²²⁰² Overall the content of the EU DCFTAs is consistent with the EU’s position in the Doha Round. The DCFTAs pursue deep integration by addressing diverse regulatory issues apart from trade *sensu stricto*. It was confirmed that as it was not possible to unblock the WTO from the inside, the strategy is to do so from the outside, with the inclusion of competition chapters in FTAs as part of this strategy. The EU-US TTIP agreement is called ‘a necessary

²¹⁹⁶ D. D. Sokol, “Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements”, *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 272.

²¹⁹⁷ J. Rennie, “Competition regulation in SAFTA, AUSFTA and TAFTA: a spaghetti bowl of competition provisions?”, *International Trade Law & Regulation*, Vol. 15, No. 2, 2009, 35.

²¹⁹⁸ D. D. Sokol, “Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements”, *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 234.

²¹⁹⁹ P. Holmes, A. Papadopoulos, B. Özgür Kayali & A. Sydorak, “A Taxonomy of International Competition Cooperation Provisions”, paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 105–106.

²²⁰⁰ D. D. Sokol, “Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements”, *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 275.

²²⁰¹ S. Woolcock, “European Union policy towards Free Trade Agreements”, ECIPE Working paper no. 03/2007, 4.

²²⁰² J. P. Trachtman, “International trade: regionalism” in Andrew T. Guzman & Alan O. Sykes (eds), *Research Handbook in International Economic Law*, Cheltenham, Edward Elgar Publishing, 2007, 160.

condition' to move forward in the WTO, and is compared to the Franco-German tandem dynamic within the EU.²²⁰³ The EU does face some criticism, however, that it is still striving to promote multilateral rules, but has given up on the multilateral process.²²⁰⁴ TSCHAENI and ENGAMMARE concluded that "[g]iven that it is reasonably clear that there will be no comprehensive multilateral rules on competition in the WTO in the near future, FTAs provide the natural venue to address such issues."²²⁰⁵ Some believe that bilateral advocacy for a robust global competition policy is easier than in a multilateral context. It can be seen as a strategy to break up the WTO-deadlock from the outside rather than from within. FTAs can then be considered as laboratories for experimentation and the experience gained can be used to persuade others. FTAs could indeed entice other parties to join by developing new rules.²²⁰⁶ They could create advocates of a robust competition policy at the global level, which in turn may increase the chances that FTA may help set standards above those currently in the WTO.²²⁰⁷

This justification for bilateral and regional trade agreements is known as the 'building block theory'. It is referred to when explaining why regional trade agreements are tolerated by the WTO even though they have trade diverting effects. The building block theory itself is a manifestation of the broader concept of political consensus-building in public choice theory, under which consensus in smaller groups will lead to consensus among a larger cluster via negotiations, trade-offs and political logrolling.²²⁰⁸ In a Commission staff working document that formed an annex to the Global Europe Communication, it was stated that FTAs could, among other things, "*prepare the ground for future global trade rounds*," thereby forming a stepping stone for multilateral liberalization.²²⁰⁹ Bilateral agreements do of course have their own particularities, and therefore their content cannot simply be transferred lock, stock and barrel to the multilateral level.²²¹⁰ There is debate, however, on whether FTAs are truly beneficial to the development of multilateral trade rules. The building-block theory is opposed by the stumbling-block theory. Those opposed to bilateral FTAs are point to the discriminatory nature of such agreements, and the level of complexity and uncertainty they bring to the international business world. It is moreover claimed that competitive liberalisation has not boosted the multilateral trading system in the numbers.²²¹¹

²²⁰³ GREEN -GEM Summer School "Competing for growth, trade & influence - The externalisation of the EU's policies through: multilateral governance, interregionalism, & global networks", 31 August-5 September 2014. Commission officials were present.

²²⁰⁴ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 235.

²²⁰⁵ H. Tschaeni & V. Engammare, "The Relationship between Trade and Competition in Free Trade Agreements: Developments since the 1990s and Challenges", *European Yearbook of International Economic Law*, Vol. 4, 2013, 44.

²²⁰⁶ R. Ahearn, "Europe's Preferential Trade Agreements: Status, Content, and Implications", CRS Report for Congress, 3 March 2011, 28.

²²⁰⁷ D. D. Sokol, "Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements", *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 247.

²²⁰⁸ M. Taylor, *International Competition Law: a new dimension for the WTO?*, 2006, Cambridge, Cambridge University Press, 128.

²²⁰⁹ Commission Staff Working Document, Annex to the Communication from the Commission to the Council, the European Parliament, the European Economic and Social committee and the Committee of the Regions, "Global Europe: Competing in the World", SEC(2006) 1230, 4 October 2006, 16.

²²¹⁰ P. Hilpold, "Regulating International Competition Issues by Regional Trade Agreements: A Stepping Stone Towards a Plurilateral Trade Agreement?", *European Yearbook of International Economic Law*, Vol. 4, 2013, 86.

²²¹¹ R. Ahearn, "Europe's Preferential Trade Agreements: Status, Content, and Implications", CRS Report for Congress, 3 March 2011, 1, 27–29.

According to ARAUJO “[t]he EU’s current external trade practice confirms the view that bilateralism is used by trading powers to override the irksome developing country opposition in the multilateral context”.²²¹² Because of a lack of binding multilateral rules in the field of competition law, sovereignty concerns are voiced more strongly, making the negotiation of enforceable clauses very difficult, resulting in a more flexible and indirect approach.²²¹³ It is telling that many of the same countries that protested against the negotiations of a binding multilateral framework on competition policy during the Doha trade round, have indeed signed binding international rules on competition law and policy in bilateral or regional trade agreements.²²¹⁴ HILPOLD equally pointed out that “states that have opposed the insertion of competition provisions in WTO law appear not to have had any problem in agreeing to such rules on a regional level.”²²¹⁵ It has been claimed that “some developing country negotiators were well aware of the potentially precedent setting nature of competition provisions in RTAs for discussions on a multilateral framework in the WTO.”²²¹⁶ Perhaps after the collapse of such multilateral negotiations, this reticence has diminished in a bilateral context. Another explanation, put forward by TSCHAENI and ENGAMMARE, is that WTO negotiations failed due to feared imbalances in and overload of the agenda rather than true opposition on substantive issues.²²¹⁷ This might explain why the same objections do not recur in FTA negotiations. Finally, there is less uncertainty today about the nature of international competition law enforcement and the ensuing challenges than there were at the time of WTO negotiations.²²¹⁸

1.4.1.5 Influence of business

Multilateral companies are not mere bystanders in the process of globalisation. It is possible that international businesses have pushed for competition provisions in FTAs. Including a competition chapter in an FTA may have a certain reputational and branding effect about the importance of competition policy to a country’s economy. This in turn may result in incentives for foreign investors, who will prefer a competitively neutral business environment in an open economy with consistent regulation.²²¹⁹ Indeed, there is some empirical evidence that FTA provisions relating to competition law, in particular those relating to transparency, positively influence the amount of foreign direct investment (FDI) inflows to a country. Competition provisions in FTAs seem to have a positive impact on the value of inward cross-border mergers and acquisitions, for instance.²²²⁰ On

²²¹² B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 238.

²²¹³ J. Bourgeois, “Competition Policy: the Poor Relation in the European Union Free Trade Agreements” in I. Govaere, E. Lannon, P. Van Elsuwege & S. Adam (eds), *The European Union in the World – Essays in honour of Marc Maresceau*, Leiden/Boston, Martinus Nijhoff Publishers, 2014, 396.

²²¹⁴ S. J. Evenett, “What can we really learn from the competition provisions of regional trade agreements?”, 23 August 2005, available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.583.9612&rep=rep1&type=pdf> (accessed February 2017), 2.

²²¹⁵ P. Hilpold, “Regulating International Competition Issues by Regional Trade Agreements: A Stepping Stone Towards a Plurilateral Trade Agreement?”, *European Yearbook of International Economic Law*, Vol. 4, 2013, 71-72.

²²¹⁶ S. J. Evenett, “What can we really learn from the competition provisions of regional trade agreements?”, 23 August 2005, available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.583.9612&rep=rep1&type=pdf> (accessed February 2017), 11.

²²¹⁷ H. Tschaeni & V. Engammare, “The Relationship between Trade and Competition in Free Trade Agreements: Developments since the 1990s and Challenges”, *European Yearbook of International Economic Law*, Vol. 4, 2013, 42.

²²¹⁸ P. Hilpold, “Regulating International Competition Issues by Regional Trade Agreements: A Stepping Stone Towards a Plurilateral Trade Agreement?”, *European Yearbook of International Economic Law*, Vol. 4, 2013, 75.

²²¹⁹ D. D. Sokol, “Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements”, *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 271, 276.

²²²⁰ It must be mentioned, however, that these conclusions have been drawn from a single study, not taking into account potential other economically important variables. J. Bourgeois, K. Dawar & S. J. Evenett, “A comparative analysis of

the contrary, an OECD impact study indicated that competition-reducing policies resulted in less investments and consumption by approximately 15% compared to competitive levels.²²²¹ However, other anecdotal evidence from an investment treaty context indicates that competition policy chapters do not influence country or agency behaviour.²²²²

1.4.1.6 Regulatory export of own model and approximation to the *acquis*

Engaging with newer competition authorities via specialized bilateral agreements can be risky, as the necessary trust might be lacking between the competition authorities. An alternative therefore can be the inclusion of competition provisions in FTAs to influence the content of competition laws in countries with a dissimilar competition system, while at the same time increasing the importance of one's own competition system in the global scheme.²²²³ In the context of the ENP in particular, FTAs can form a suitable vehicle to approximate the signatories' competition laws to that of the EU. The EU in particular has the reputation of using its negotiating power in FTAs to export its *acquis*, in particular in the case of association agreements. Bilateralism can then be regarded as “*a strategy used by economically strong states in order to increase their power over their weaker co-signing parties*”.²²²⁴ ARAUJO does find, however, that the EU fails to recognize that not all disciplines it seeks to include in its DCFTAs are necessarily welfare enhancing for developing countries.²²²⁵ The EU is therefore vulnerable to accusations of packaging self-interested regulatory reforms as development-friendly policies.²²²⁶

Even though competition provisions are not always very detailed in the FTA itself, this does not necessarily mean that there is no approximation in reality. Young competition jurisdictions such as Moldova for instance, may count on continued guidance of the EU Commission in the development of their competition laws and enforcement, in particular with regard to state aid (the EU-Moldova Agreement explicitly refers to Article 107 TFEU, and foresees that the matters of the competition chapter should be kept ‘under constant review’, and the implementation should be assessed every two years). However, one could say that this type of integration is rather the exception. The EU does not seem to use its DCFTAs to aggressively promote its own norms, even if competition policy has become a regular component of FTAs and even if evidently the *acquis* shapes the EU's negotiating position.²²²⁷ Moreover, in many instances, the EU's trade partners have already enacted EU-inspired competition legislation. In this case, the competition provisions in FTAs mainly serve then to lock in domestic competition law systems and to disseminate more broad international regulatory principles

selected provisions in free trade agreements”, Commissioned by DG TRADE, October 2007, <http://www.kamaladawar.com/userfiles/file/downloads/A%20Comparative%20Analysis%20of%20Selected%20FTAs.pdf> (accessed February 2017), 188-189. Disclaimer: this article concerns Australian FTAs.

²²²¹ J. Steenbergen, “Competition and trade policy and the challenge of globalization” in I. Govaere, R. Quick and M. Bronckers (eds), *Trade and Competition Law in the EU and Beyond*, Cheltenham, Edward Elgar Publishing, 2011, 14.

²²²² D. D. Sokol, “Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements”, *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 271.

²²²³ J. Bourgeois, “Competition Policy: the Poor Relation in the European Union Free Trade Agreements” in I. Govaere, E. Lannon, P. Van Elsuwege & S. Adam (eds), *The European Union in the World – Essays in honour of Marc Maresceau*, Leiden/Boston, Martinus Nijhoff Publishers, 2014, 383. It must be mentioned, however, that this factor likely does not play a strong role when concluding FTAs with more advanced trade partners.

²²²⁴ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 95-96.

²²²⁵ As examples he mentions investment protection and investor-state dispute settlement for instance. B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 231.

²²²⁶ Ibid.

²²²⁷ S. Woolcock, “European Union policy towards Free Trade Agreements”, ECIPE Working paper no. 03/2007, 4.

(see below, Part III, 1.4.1.7).²²²⁸ Most often the broad-termed competition provisions in the EU's FTAs will not entail any significant harmonisation.²²²⁹

1.4.1.7 Promote and lock-in domestic reform

It is rightly claimed that domestically, one of the main benefits of behind-the-border measures in FTAs is that they may facilitate domestic policy reforms, by providing the means to overcome domestic constituencies that could otherwise block the reform process.²²³⁰ SOKOL agrees that competition law chapters in FTAs are aimed in particular at strengthening domestic antitrust systems. They do so by creating an international lever to push reforms and commitments that would not be possible in absence of international support, due to objections and political capture by domestic interest groups.²²³¹ Support of other competition authorities that are better equipped than sector regulators to oppose such capture may increase domestic independence. Such domestic support is all the more important because “*the contribution of competition policy to the management of globalization is inevitably less direct and more difficult to bring across than trade policy measures*”, in particular after the financial crisis, necessitating competition authorities to defend and advocate the legitimacy of their policies.²²³² Including competition provisions in the broader framework of an FTA may decrease the risk of misusing or instrumentalising competition law to advance goals which go beyond the competitive process as understood by many, such as industrial policies or to advance political agendas and protectionism, as was allegedly the case for instance when Coca-Cola's bid for China Huiyuan Juice Group Ltd was blocked.²²³³ When such instrumentalisation is coupled with politically dependent enforcement structures, this may lead to arbitrary and unpredictable competition policy.²²³⁴ The impact will, however, remain relatively limited as the provisions are excluded from the dispute settlement mechanism.

Apart from pushing for domestic reform, it may also increase domestic legitimacy in general, and aid competition agencies to pursue their mission.²²³⁵ The inclusion of a competition chapter in a high-profile FTA may strengthen the legal status of the competition agency, thereby increasing popular or interest group-based support for the enforcement of competition law, which may in turn lead to

²²²⁸ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 227. Also see S. Woolcock, “European Union policy towards Free Trade Agreements”, ECIPE Working paper no. 03/2007, 4.

²²²⁹ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 196.

²²³⁰ J. Bourgeois, K. Dawar & S. J. Evenett, “A comparative analysis of selected provisions in free trade agreements”, Commissioned by DG TRADE, October 2007, <http://www.kamaladawar.com/userfiles/file/downloads/A%20Comparative%20Analysis%20of%20Selected%20FTAs.pdf> (accessed February 2017), 167.

²²³¹ D. D. Sokol, “Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements”, *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 244.

²²³² J. Steenbergen, “Competition and trade policy and the challenge of globalization” in I. Govaere, R. Quick and M. Bronckers (eds), *Trade and Competition Law in the EU and Beyond*, Cheltenham, Edward Elgar Publishing, 2011, 15.

²²³³ A. Ezrachi, “Sponge”, *Journal of Antitrust Enforcement*, Vol. 5, No. 1, 2017, 73. See S. Wong and W. Cheng, “China Blocks Coca-Cola's \$2.3 Billion Huiyuan Bid”, Bloomberg, 18 March 2009; C. Saehoon Chung, K. Yeon Kim & K. Hyun Kim, “Early Signs of Protectionist Merger Control in Korea? Probably No, At Least Not Yet”, *Competition Policy International*, 29 October 2015.

²²³⁴ A. Ezrachi, “Sponge”, *Journal of Antitrust Enforcement*, Vol. 5, No. 1, 2017, 59.

²²³⁵ D. D. Sokol, “Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements”, *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 273.

more resources being granted by the national legislature to such an agency.²²³⁶ Competition provisions in FTAs may create political imperative to act. They have the ability to provide competition law with a higher profile and greater legitimacy, thereby creating some sense of urgency.²²³⁷ More than that, they may even offer guidance in the agenda setting of younger agencies, thereby stimulating the emergence of legislation.²²³⁸ Finally, the inclusion of competition provisions in an FTA makes it politically and economically more costly for successive governments to depart from the policy choices made at the time of the agreement.²²³⁹

Domestic reforms can therefore be pushed, locked in, or reinforced via FTAs.²²⁴⁰ As younger competition agencies lack a significant track record, concluding dedicated agreements might be too risky and difficult. Including competition chapters in FTAs with these countries might then even the path for possible further cooperation in the future, and may even lead to a domino effect, spreading a competition culture even further and increasing opportunities for more cooperation.²²⁴¹ When the regulators, in casu the competition agencies, are involved in the negotiations, this may moreover lead to more suited tailoring, which is responsive to agency concerns and a country's political economy situation, and therefore also lead to increased buy-in and better implementation, even without dispute settlement.²²⁴² This potential for domestic reform is often referred to as one of the principal, if not the primary, benefits of trade agreements aimed at measures beyond the border.²²⁴³

1.4.1.8 Genuine desire to safeguard market competition

According to TSCHAENI and ENGAMMARE, the shape of cooperation provisions should be moulded by their particular purpose, whether it is case-cooperation, generally improving the parties' knowledge of each other's competition regime, or providing technical assistance. Accordingly, the emphasis and the wording of the provisions should be different, depending on whether the

²²³⁶ S. J. Evenett, "What can we really learn from the competition provisions of regional trade agreements?", 23 August 2005, available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.583.9612&rep=rep1&type=pdf> (accessed February 2017), 13.

²²³⁷ J. Rennie, "Competition regulation in SAFTA, AUSFTA and TAFTA: a spaghetti bowl of competition provisions?", *International Trade Law & Regulation*, Vol. 13, No. 2, 2007, 35-38.

²²³⁸ D. D. Sokol, "Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements", *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 259; J. Rennie, "Competition regulation in SAFTA, AUSFTA and TAFTA: a spaghetti bowl of competition provisions?", *International Trade Law & Regulation*, Vol. 13, No. 2, 2007, 35.

²²³⁹ A. Bradford & T. Büthe, "Competition policy and free trade – Antitrust provisions in PTAs" in A. Dür, M. Elsig (eds), *Trade cooperation – the purpose, design and effects of preferential trade agreements*, Cambridge, Cambridge University Press, 2015, 247.

²²⁴⁰ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 196.

²²⁴¹ A.M. Alvarez, J. Clarke & V. Silva, "Lessons from the Negotiation and Enforcement of Competition Provisions in South-South and North-South Rtas" in P. Brusick, A. M. Alvarez & L. Cernat (eds), *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*, United Nations Publication, 2005, 139.

²²⁴² D. D. Sokol, "Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements", *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 259.

²²⁴³ See J. Bourgeois, K. Dawar & S. J. Evenett, "A comparative analysis of selected provisions in free trade agreements", Commissioned by DG TRADE, October 2007, <http://www.kamaladawar.com/userfiles/file/downloads/A%20Comparative%20Analysis%20of%20Selected%20FTAs.pdf> (accessed February 2017), 167; B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford University Press, Oxford, 2016, 196.

agreement focuses on eliminating anti-competitive practices that undermine the benefits of trade liberalization or assisting the respective authorities to cooperate with each other.²²⁴⁴

While it was mentioned before that competition provisions in FTAs are often included in support of trade objectives, a study by BRADFORD and BÜTHE indicated that the type of competition provisions most often found in FTAs, namely those promoting transgovernmental regulatory cooperation and effective competition law enforcement more generally, indicate a genuine desire by governments – or at least regulators – to safeguard market competition in an international environment. According to them transgovernmental cooperation presupposes substantial capacity of a competition regulator, which would be translated in provisions that ensure or increase regulatory capacity at the national level. Such commitments could include the devotion of resources to enforcement, the establishment and maintenance of an independent enforcement agency, and reciprocal or unilateral technical capacity-building assistance. On balance provisions suggesting a deep concern with enhanced enforcement cooperation were observed with greater frequency.²²⁴⁵ Provisions aimed at constraining competition regulators and aimed at forestalling strategic use of domestic competition policy for protectionist purposes and discriminatory enforcement of competition law appear less frequently in the sample of FTAs used by BRADFORD and BÜTHE.²²⁴⁶

1.4.2 Reasons not to integrate competition provisions in FTAs

While competition chapters in FTAs certainly have a role to play, one should ask whether the benefits are worth the costs. Such costs are certainly present. BOURGEOIS, DAWAR, and EVENETT in 2007 interviewed representatives of leading European civil society organisations about the merits of competition and state aid provisions in FTAs. Reactions ranged from minor enthusiasm to outright opposition. Many preferred other venues in which cooperation between competition agencies should be furthered and considered competition provisions to be a distraction from the central negotiating agenda of FTAs. Other concerns related to the effect of non-discrimination clauses in competition and state aid provisions on developing countries, preventing them from taking measures to promote their promising industries.²²⁴⁷

1.4.2.1 Larger Political Economy Context – Issue Trading

The decision to include a competition chapter in trade negotiations depends on the priorities and desires of potential signatories (moulded to a smaller or larger extent by the interests of lobbyists and

²²⁴⁴ H. Tschaeni & V. Engammare, “The Relationship between Trade and Competition in Free Trade Agreements: Developments since the 1990s and Challenges”, *European Yearbook of International Economic Law*, Vol. 4, 2013, 65.

²²⁴⁵ A. Bradford & T. Büthe, “Competition policy and free trade – Antitrust provisions in PTAs” in A. Dür, M. Elsig (eds), *Trade cooperation – the purpose, design and effects of preferential trade agreements*, Cambridge, Cambridge University Press, 2015, 267, 269. Their study was based on a random sample of 182 FTAs from the maximally comprehensive list of post-World War II PTAs compiled by BACCINI, DÜR, ELSIG and MILEWICZ in 2014. (A. Bradford & T. Büthe, “Competition policy and free trade – Antitrust provisions in PTAs” in A. Dür & M. Elsig (eds), *Trade cooperation – the purpose, design and effects of preferential trade agreements*, Cambridge, Cambridge University Press, 2015, 252.)

²²⁴⁶ A. Bradford & T. Büthe, “Competition policy and free trade – Antitrust provisions in PTAs” in A. Dür & M. Elsig (eds), *Trade cooperation – the purpose, design and effects of preferential trade agreements*, Cambridge, Cambridge University Press, 2015, 248.

²²⁴⁷ J. Bourgeois, K. Dawar & S. J. Evenett, “A comparative analysis of selected provisions in free trade agreements”, Commissioned by DG TRADE, October 2007, <http://www.kamaladawar.com/userfiles/file/downloads/A%20Comparative%20Analysis%20of%20Selected%20FTAs.pdf> (accessed February 2017), 199.

business groups) and how these desires play out within a larger political economy context. This may entail that competition chapters risk to become just another pawn in the game of issue-linking.²²⁴⁸ An unpopular policy reform proposal is linked with popular policy reforms in other sectors in a ‘package deal’ in an attempt to secure domestic acceptance. The downside of this mechanism, however, is that the negotiated compromise often does not reflect commonly defined supranational interests or a true compromise, but rather the relative bargaining power of the parties. In this manner, by using competing interests between policy realms as functionalist trade-offs to achieve political equilibrium, politics to a certain extent dictates the content of the resulting policy.²²⁴⁹ While this may lead to benefits and progress in the negotiations, the opposite may also be true. SOKOL finds, based on discussions with trade and antitrust negotiators, that the inclusion of competition chapters in FTAs is sometimes indeed explained by more ad hoc, case-specific reasons.²²⁵⁰ An agreement that combines elements of both industrial policy and state aid issues, is unavoidably complex and requires certain choices. FTAs may be used by more powerful parties to spread the reach of certain domestic standards, not because they are the preferred better practice, but because of the increased leverage in bilateral negotiations of that stronger party.²²⁵¹ The generic benefit of having one more pawn in the game of issue-trading by including competition provisions in an FTA does not outweigh the risks of incorporating a matter where there is substantial disagreement on the fundamentals into an already complicated trade context.

This was illustrated by the attempt to include competition in the WTO. The main reasons that the WTO-negotiations failed were not directly correlated to substantial competition law-related objections. An agenda relating to industrial policy, and dissatisfaction with the negotiations on agriculture, combined with a level of information asymmetry will have played a large role in the opposition of developing countries as well. DAMRO in this context points to the dangers of issue-linkage. GALLAGHER rightly identified the so-called ‘single undertaking’ as the main culprit. As mentioned, not everyone agreed with the priority given to the new Singapore issues, with many unresolved matters still on the table, and felt that it was an attempt to hastily force certain issues through (see above, Part I, 3.3.3.2).

On the one hand, in the context of the TTIP negotiations it has been said that while two thirds of the agreement consists of non-tariff barriers, this does not necessarily mean that there will be a give-and-take that will automatically result in a lowering of standards.²²⁵² On the other hand, the fact that some element of give-and-take plays when negotiating an FTA can be deducted from the fact that some FTAs concluded by developing countries contain elements to which the latter opposed during the WTO negotiations and therefore do not match up with the earlier stated preferences of those

²²⁴⁸ B. Eichengreen & M. Uzan, “The 1933 World Economic Conference as an Instance of Failed International Cooperation”, Working Paper No. 90-149, October 1990, University of California at Berkeley, Department of Economics; R. Putnam, “Diplomacy and domestic politics: the logic of two-level games”, *International Organization*, Vol. 42, No. 3, Summer 1988.

²²⁴⁹ A. Piilola, “Assessing theories of global governance: a case study of international antitrust regulation”, *Stanford Journal of International Law*, Vol. 39, 2003, 211.

²²⁵⁰ D. D. Sokol, “Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements”, *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 258.

²²⁵¹ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 236.

²²⁵² “EU Common Commercial Policy in the Lisbon Era – Achievements and Prospects”, Policy seminar Global Governance Programme EUI, Fiesole, 16 October 2014.

developing countries.²²⁵³ If competition provisions are included in an FTA as a consequence of issue-trading, in particular if this happened as a result of an imbalance in negotiation power, this may lead to “an imbalance in expertise in fields requiring detailed knowledge and training.”²²⁵⁴ It is crucial then that there is sufficient follow-up and guidance, or the agreement may actually undermine a healthy competition culture. If competition rules are ‘imposed’ on countries that are not ready because they are included in an ‘FTA-package’, this will not contribute to the development of strong and convergent competition regimes.²²⁵⁵

1.4.2.2 Trade and competition are not the same

As mentioned, while trade and competition law may complement each other, they are not the same, nor are the preferences of the respective negotiators. Competition rules in competition cooperation agreements are seen by DG COMP as means to avoid conflicting regulatory decisions among proliferating national competition regimes, while DG Trade promotes competition rules in FTAs as a means to open markets and prevent private barriers from replacing public barriers to trade. The priorities and issue-linkage preferences of DG Trade, when pursuing non-trade goals within the WTO for instance, were different than those of DG COMP. According to DAMRO, DG COMP is wary of issue linkages as they potentially increase the likelihood of political intervention.²²⁵⁶ Some of the US’s reservations during the WTO talks on the potential inclusion of competition law were in fact shared by officials from DG COMP, who, according to ARAUJO considered their colleagues at DG Trade ill-equipped to fully apprehend the complexities surrounding competition issues.²²⁵⁷

Competition rules cannot be negotiated through the conventional procedure used for removing trade barriers, namely exchanging concessions, as competition law enforcement depends on the domestic agency’s enforcement capacities.²²⁵⁸ While the regulators are involved in the negotiations of DCFETAs,²²⁵⁹ the fact remains that DG Trade is the main DG in charge of these negotiations, not DG COMP. The Commission indeed is not a unitary actor, and combines different policy objectives and consequently differing preferences concerning the most appropriate venue for international cooperation.²²⁶⁰ Depending on who takes the lead in drafting the initial template, potential commitments in competition policy chapters may be different, and their effectiveness depends on

²²⁵³ S. J. Evenett, “What can we really learn from the competition provisions of regional trade agreements?”, 23 August 2005, available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.583.9612&rep=rep1&type=pdf> (accessed February 2017), 45-46.

²²⁵⁴ H. Grosse Ruse-Khan, T. Jaeger & R. Kordic, “The role of atypical acts in EU external trade and intellectual property policy”, *The European Journal of International Law*, Vol. 21, No. 4, 2011, 929.

²²⁵⁵ Interview with Randy Tritell (Director, Office of International Affairs, US FTC) by Gönenç Gürkaynak (Managing Partner, ELIG, Attorneys-at-Law) in view of their panel “Globalization and the Rise of Regionalism: TPP, ASEAN, COMESA, MINT and Coherence in the World”, Competition and Globalization in Developing Economies Conference, New York City, 28 October 2016.

²²⁵⁶ C. Damro, “The new trade politics and EU competition policy: shopping for convergence and co-operation”, *Journal of European Public Policy*, Vol. 13, No. 6, September 2006, 873, 882.

²²⁵⁷ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 184.

²²⁵⁸ J. Tavares de Araujo, Jr., “Competition policy and the EU-Mercosur trade negotiations”, paper prepared for the Working Group on EU-Mercosur Trade Negotiations, Paris, 12-13 May 2000, 14.

²²⁵⁹ Transatlantic Trade and Investment Partnership – The Regulatory Part, September 2013, http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151605.pdf (accessed February 2017), 5. “EU Common Commercial Policy in the Lisbon Era – Achievements and Prospects”, Policy seminar Global Governance Programme EUI, Fiesole, 16 October 2014.

²²⁶⁰ C. Damro, “The new trade politics and EU competition policy: shopping for convergence and co-operation”, *Journal of European Public Policy*, Vol. 13, No. 6, September 2006, 869.

competition agency support. Trade negotiators may also experience a different kind of pressure to reach agreement, which may influence their policy choices. In this way “[t]he inclusion of provisions that may create contention in what is a second order chapter [...] may not be a priority for the trade negotiators.”²²⁶¹ Even if intra-institutional consultations are held, the final trade-offs may still be to the dissatisfaction of DG COMP.

1.4.2.3 Politicisation

Operational independence of competition authorities is recognised international standard.²²⁶² Cases with conflicting decisions, such as *Boeing/McDonnell Douglas* underlined the importance of economic analysis and legal rules, wary of political influence and intertwined issues of trade policy, which should not come into play when scrutinising a transaction.²²⁶³ Former EU Competition Commissioner MARIO MONTI declared that competition decisions are “a matter of law and economics”, and should be resolved as such, without political intervention to resolve a dispute.²²⁶⁴ Competition law, however, is not apolitical. On the contrary, it entails the use of political power to constrain or even redistribute economic power and is therefore inherently political.²²⁶⁵ Politics can come into play via the allocation of resources, the appointment of officials, etcetera. In the US in 1971, president NIXON even threatened to pursue the television networks ABC, NBC, and CBS on antitrust grounds in order to decrease their negative media coverage, turning the threat of an antitrust suit into a political tool.²²⁶⁶ The effect that competition legislation may have on undertakings’ strategies and profit margins, makes it a central target of lobbying efforts, both with regard to the discouraging or encouraging enforcement action as well as with regard to the analytical framework prescribed by the law and economic theory and followed by the competition agency.²²⁶⁷ One particular risk that comes along with the inclusion of competition provisions in trade agreements is increased exposure to such politicisation, while simultaneously it is a good reason to include them in an international agreement.

Some claim that trade policy has become more political after the entry into force of the Lisbon treaty. Trade policy has always been closely intertwined with (geo)politics. Trade agreements cover a wide array of topics, thereby attracting the attention from different interest groups. RENNIE rightly states that free trade agreements are not merely trade documents, but have become multifaceted political documents.²²⁶⁸ Thereby, trade itself is creating political waves. The move to a more regulatory-aimed trade policy has influenced the treaty-making process. Some consider the

²²⁶¹ D. D. Sokol, “Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements”, *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 258.

²²⁶² H. Tschaeni & V. Engammare, “The Relationship between Trade and Competition in Free Trade Agreements: Developments since the 1990s and Challenges”, *European Yearbook of International Economic Law*, Vol. 4, 2013, 61.

²²⁶³ A. Schaub, “International Co-operation in Antitrust matters: making the point in the wake of the Boeing/MDD proceedings”, *Competition Policy Newsletter*, No. 1, February 1998.

²²⁶⁴ C. Damro, “The new trade politics and EU competition policy: shopping for convergence and co-operation”, *Journal of European Public Policy*, Vol. 13, No. 6, September 2006, 871.

²²⁶⁵ T. Büthe, “The politics of market competition: trade and antitrust in a global economy”, paper for Martin, Lisa L. (ed.), *The Oxford Handbook of the Political Economy of International Trade*, Oxford, Oxford University Press, 2015, available at http://leitner.yale.edu/sites/default/files/files/resources/papers/Buthe_chapter_all_2014-03-20.pdf (accessed July 2017), 2.

²²⁶⁶ W. Pincus & G. Lardner, Jr., “Nixon Hoped Antitrust Threat Would Sway Network Coverage”, *Washington Post Staff Writers*, 1 December 1997; M. Stucke, “Does the Rule of Reason Violate the Rule of Law?”, *UC Davis Law Review*, Vol. 42, No. 5, 2009, 1449, as mentioned in A. Ezrachi, “Sponge”, *Journal of Antitrust Enforcement*, Vol. 5, No. 1, 2017, 56.

²²⁶⁷ A. Ezrachi, “Sponge”, *Journal of Antitrust Enforcement*, Vol. 5, No. 1, 2017, 70.

²²⁶⁸ J. Rennie, “Competition regulation in SAFTA, AUSFTA and TAFTA: a spaghetti bowl of competition provisions?”, *International Trade Law & Regulation*, Vol. 13, No. 2, 2007, 35.

involvement of the Parliament a nuisance due to its lack of technical capacity and therefore its lack of informational autonomy. The attention that the negotiation of mega-FTAs such as TTIP have drawn may result in an enormous increase in the political cost of concluding FTAs.²²⁶⁹ Due to their pervasive influence over the economic activity and growth of a nation, FTAs increasingly find themselves subject to public debate, as well as the target of advocacy by both governmental and non-governmental stakeholders. The negotiation of international trade agreements is under growing political and social scrutiny, which makes their conclusion even more complex.²²⁷⁰ Competition law provisions thereby are not immune to such influences. The Business Coalition for Transatlantic Trade for instance, who's Steering Committee is co-chaired by major companies with significant equities in the transatlantic economy as well as many multi-sectorial industry organizations, has a Competition Working Group that focuses on the elements of a traditional competition chapter of a trade negotiation. Priority areas include transparency and due process as well as state-owned and state-favoured enterprises.²²⁷¹ The Commission itself stated that "*competition policy cannot be pursued in isolation, as an end in itself, without reference to the legal, economic, political and social context.*"²²⁷² While competition law is often seen as a stable discipline, based on economic considerations and wary of external social, or political objectives, competition law, as any other branch of law, is capable of absorbing external influences, particularities, and being subject to intellectual and regulatory capture.²²⁷³

1.4.2.4 Mixity

The increased complexity of trade negotiations in terms of topics covered has had an effect on the treaty-making process. One very tangible example is the issue of 'mixity'. The expanding scope of FTAs has led to an increased role of the Member States in EU-trade policy. Topics that do not belong to the exclusive competence of the EU, such as investor-state dispute settlement, necessitate that EU FTAs are concluded as 'mixed agreements', whereby individual Member States have to ratify the agreement alongside the EU according to their national procedures. The result of the Dutch referendum concerning the EU-Ukraine Association Agreement (that also contains a trade agreement) demonstrates the risks that this may bring.²²⁷⁴ The Agreement was moreover rejected not so much because of its content, but rather a general dissatisfaction with the Dutch government or more broadly concerns regarding migration or against the EU as such. Romania and Bulgaria similarly threatened to block CETA if the visa-requirements for their citizens were not abandoned.²²⁷⁵ The Belgian region of Wallonia equally attempted to block CETA.²²⁷⁶ VAN DER LOO rightly pointed out that a 'common' trade policy that is being steered from 28 capitals is not a viable way to address the modern-day challenges.²²⁷⁷

²²⁶⁹ "EU Common Commercial Policy in the Lisbon Era – Achievements and Prospects", Policy seminar Global Governance Programme EUI, Fiesole, 16 October 2014.

²²⁷⁰ H. Paemen, "A new trade policy" in D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae Civis – Liber Amicorum Jacques Steenbergen*, Gent, Larcier, 2014, 139.

²²⁷¹ See <http://www.transatlantictrade.org/issues/competition-policy/> (accessed July 2017).

²²⁷² European Commission, XXIIInd Report on Competition Policy 1992, 27 October 1993, 13, as cited in A. Ezrachi, "Sponge", *Journal of Antitrust Enforcement*, Vol. 5, No. 1, 2017, 52.

²²⁷³ A. Ezrachi, "Sponge", *Journal of Antitrust Enforcement*, Vol. 5, No. 1, 2017, 49.

²²⁷⁴ D. Robinson, "Dutch reject EU-Ukraine trade deal", *Financial Times*, 7 April 2016.

²²⁷⁵ G. Gotev, "Romania, Bulgaria, Canada seek to unlock CETA by solving visa dispute", *EurActiv*, 14 July 2016.

²²⁷⁶ X., Belgian region of Wallonia blocks EU-Canada trade deal, *EurActiv*, 14 October 2016.

²²⁷⁷ G. Van der Loo, "Wat nu met onze vrijhandel?", *De Redactie*, 18 October 2016.

The Commission, considering the broad and deep material coverage of the EU-Singapore DCFTA, asked the Court in October 2014 to clarify whether it had the competence to conclude the Agreement on its own or whether it had to involve the Member States. Building on Opinion 1/76, Opinion 2/15 therefore had the potential to end the lengthy parallel ratification procedures required by ‘mixity’ and allow ‘EU-only’ trade and investment agreements. The most contentious policy areas in this case were transport, investment, intellectual property rights, and sustainable development. It was the Commission’s aim to reach the most expansive possible interpretation of Article 207 TFEU and of the expansion of the Common Commercial Policy exclusive external powers by the Lisbon Treaty. It relied on a broad application of the ‘centre of gravity’ theory and the provisions of Article 3(2) TFEU to advocate for implied exclusivity of otherwise shared competences.²²⁷⁸ With regard to competition law, the Advocate General began by stating that a comprehensive WTO policy on competition and trade has not yet been adopted. She underlined the goal of the competition chapter, which is to comprehensively address the harmful effects on trade between the EU and Singapore which might result from public or private anticompetitive conduct or practices. She then explored the link with international trade, by focussing on Articles 12.7.2 and 12.8.1 of the agreement, dealing with subsidies, in particular. Importantly, SHARPSTON underlined that in her opinion the provisions concerning cooperation and coordination *sensu lato* are all ancillary to the main substantive obligations set out in Chapter Twelve and therefore do not undermine the conclusion that that chapter is aimed at promoting, facilitating or governing trade and thus has direct and immediate effects on trade in goods and services. She therefore concluded that Chapter Twelve falls entirely within the scope of the European Union’s exclusive competence under Article 207(1) TFEU.²²⁷⁹

The Court, with regard to the commitments concerning competition, underlined that Articles 12.1.2 and 12.2 form part of the liberalisation of trade between the EU and Singapore, specifically relating to the combatting of anti-competitive activities. It therefore finds that such provisions fall within the field of the common commercial policy and not the field of the internal market. It is demonstrated that the competition provisions in the agreement do not relate ‘in the slightest’ to harmonisation of the laws of the EU member states or to trade between member states, but relate to trade between the EU and Singapore. The Court therefore concluded that Chapter 12 of the agreement falls within the exclusive competence of the EU.²²⁸⁰ However, overall, the Court was of the opinion that the EU-Singapore FTA as it stood could only be concluded by the EU and the Member States together, on account of the fact that two elements of the EU-Singapore did not fall under the exclusive competence of the Commission according to the Court, namely non-direct foreign investment and investor-state dispute settlement.²²⁸¹

2. Geographical integration: the multilateral approach

It is clear that bilateral contacts are not enough to face the challenges that international competition law cooperation is facing, in particular since the EU-US duopoly is being challenged by the growth

²²⁷⁸ D. Kleimann & G. Kübek, “The Future of EU External Trade Policy - Opinion 2/15: Report from the Hearing”, 4 October 2016, <http://eulawanalysis.blogspot.be/2016/10/the-future-of-eu-external-trade-policy.html> (accessed February 2017).

²²⁷⁹ Opinion of Advocate General Sharpston of 21 December 2016, Opinion pursuant to Article 218(11) TFEU, Opinion procedure 2/15, EU:C:2016:992, paragraph 459-466.

²²⁸⁰ Opinion 2/15 of the Court of 16 May 2017, EU:C:2017:376, paragraph 131-138.

²²⁸¹ Court of Justice of the European Union, Press Release, “Opinion 2/15: The free trade agreement with Singapore cannot, in its current form, be concluded by the EU alone”, No 52/17, Luxembourg, 16 May 2017; Opinion 2/15 of the Court of 16 May 2017, EU:C:2017:376.

and development of competition law and agencies in other countries. A European Commission Group of Experts on Competition Law noted in 1995 already that it would be “*difficult to imagine the emergence of a level playing field if this were to be founded only on a group of inevitably heterogenous [sic] bilateral agreements.*”²²⁸² New competition agencies have entered the playing field and existing ones have gained in experience and strength. The increasing power of emerging economies, combined with their fledgling efforts in the field of competition law, has led to a shift in international power relations between competition agencies. The enforcement and policy agenda can no longer be determined solely from Washington D.C. and Brussels, but requires input from Beijing, Brasilia, Moscow, Ottawa, Pretoria, Seoul, Tokyo, and others.²²⁸³ Regardless of the remaining impact and influence of the two most experienced jurisdictions, a transatlantic agreement no longer suffices to tackle global issues and set the international standard.²²⁸⁴ The duopoly has shifted to an oligopoly with several power centres.²²⁸⁵

One example of the implications of multiple power centres is the *P3 Shipping Alliance* case. The US in early 2014 had approved a proposed alliance of three major European shipping liners. Ocean shipping carriers Maersk Line, MCS, and CMA CGM wanted to conclude an operation agreement, that would not entail cooperation on commercial aspects, such as pricing or customer relationships, but would involve the day-to-day management of vessels worldwide. For this purpose a joint corporate entity overseeing these operations would be created. This was not considered a ‘full function’ joint venture under EU law because it had no customer facing activities and only performed a limited function. Other jurisdictions, however, including in Germany, Poland, Korea, and China, did consider the operation to be a full merger and evaluated it as such. In the US, P3 was exempt from the Hart-Scott-Rodino Act, but was subject to review under the Shipping Act. While the EU decided not to open an investigation (the operation was informally approved), the operation was approved in both the US and other jurisdictions, so it was expected that the merger would take place. In June 2014, however, China’s MOFCOM rather unexpectedly blocked the transaction under their merger control regime. The fact that the decision appeared as somewhat of a surprise indicates that the communication among the agencies did not proceed entirely smoothly.²²⁸⁶

The importance of multilateralism can be seen in the general enforcement trends as well, where cross-border cases become increasingly international. In 2010-2011 for instance, an average of 4 agencies was involved in each cooperation case concerning cartels. A similar trend can be seen in merger cases. The *Thermo Fisher/Life Technologies* case involved 7 non-EU agencies, while the *Holcim*

²²⁸² See European Commission, Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules – Report of the Group of Experts, COM(95)359 final, 12 July 1995, as cited in M. Taylor, *International Competition Law: a new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 139.

²²⁸³ F. Montag & D. Colgan, “The complexity of cartel enforcement in times of globalization of competition law”, *CPI Antitrust Chronicle*, Vol. 1, October 2011, 2-3.

²²⁸⁴ W.E. Kovacic, “Nine next steps for transatlantic antitrust policy cooperation”, *CPI Antitrust Chronicle*, Vol. 1, October 2011, 2.

²²⁸⁵ “Crossing Merger Control Frontiers: What are the new borders?”, 3rd Annual conference organized by Concurrences and Paul Hastings, Paris, 30 October 2015.

²²⁸⁶ X., “Global merger enforcement workshop at the International Competition Network (ICN)”, *EU Competition and Regulatory Newsletter Slaughter and May*, 25 September – 1 October 2015, Issue 38, 3; Interview of Chief Legal Counsel Camilla Holtse (Maersk) by Kostis Hatzitaskos (Cornerstone Research) in view of their panel “international mergers: working across multiple jurisdictions”, Global Antitrust Economics Conference, Chicago, 7 October 2016.

cement merger involved 8.²²⁸⁷ This implies that rather than being in a period of conflict, the transition has been made to a period of forum shopping, whereby competition authorities are in competition with each other.²²⁸⁸ This has both positive and negative implications, but in any event requires multilateral coordination. The meaning of ‘multilateralism’ is at times subject to debate. Some, mainly political scientists, consider an agreement multilateral even when it is regional, including three parties or more, while others consider only global agreements to be multilateral. This study adheres to the former approach.

2.1 Different multilateral forums with distinct yet overlapping roles

The European Parliament in 2013 called on the Commission to “*actively promote competition enforcement cooperation at international level, mainly in multilateral fora such as the World Trade Organisation (WTO), the International Competition Network (ICN) and the Organisation for Economic Cooperation and Development (OECD)*” as it believed this to be the most effective means of cooperation.²²⁸⁹ This section does not aim to provide an exhaustive description of the main multilateral venues where competition law issues can be discussed. It rather provides an analysis of the main distinctive features of each venue, in order to come to an optimal work-sharing system among the bilateral and the multilateral planes, as well as among the multilateral venues themselves.

2.1.1 OECD: competition for the developed world

2.1.1.1 Origins, membership, and functioning

One of the oldest and most well-known multilateral venues for competition law and policy discussions is the Organisation for Economic Cooperation and Development. The OECD was founded in 1961. The Committee on Restrictive Business Practices, the predecessor of the Competition Committee, was one of the first OECD committees to be established.²²⁹⁰ The OECD’s mission was to expand free trade and improve development in its member countries.²²⁹¹ Its headquarters are in Paris, but the OECD also has regional centres. It is led by a secretary-general, and has a secretariat at its disposition with a staff of about 2500. It obtains its operating budget from member contributions.²²⁹² Currently the OECD describes its mission as promoting “*policies that will improve the economic and social well-being of people around the world.*”²²⁹³ The task-set is very diverse, ranging

²²⁸⁷ European Parliament, Directorate-General for Internal Policies, Policy Department A – Economic and Scientific Policy, Competition Policy in International Agreements – Study for Econ Committee, IP/A/ECON/2015-02, August 2015, 29.

²²⁸⁸ “Competition policy at the intersection of equity and efficiency – honouring the scholarship of Eleanor M. Fox”, Global Competition Law Center at the College of Europe and UCL Centre for Law, Economics and Society Conference, Brussels, 8 June 2016.

²²⁸⁹ European Parliament Resolution on EU Cooperation Agreements on Competition Policy Enforcement – The Way Forward, 2013/2921(RSP), 5 February 2014, paragraph 9.

²²⁹⁰ R. Brandenburger, “Antitrust enforcement in a network culture: opportunities and challenges in the 21st century” in N. Charbit, E. Ramundo, A. Chehtova, & A. Slater (eds), *William E. Kovacic An Antitrust Tribute, Liber Amicorum – Volume I*, New York, Institute of Competition Law, 2012, 391.

²²⁹¹ D. Garza, J. Yarowsky, B. Burchfield, W. S. Cannon, D. Carlton, M. Delrahim, J. Jacobson, D. Kempf, Jr., S. Litvack, J. Shenefield, D. Valentine, J. Warden, *Antitrust Modernization Commission - Report and Recommendations*, April 2007, 216.

²²⁹² H. M. Hollman & W. E. Kovacic, “The International Competition Network: Its Past, Current and Future Role” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Morsel, Intersentia, 2011, 64.

²²⁹³ See <http://www.oecd.org/about/> (accessed July 2017).

from explaining certain economic, social, and environmental changes, as well as predicting future trends, based on measurements of productivity and global flows of trade and investment. One of the main tasks, however, in particular in the field of competition law, is international standard-setting.²²⁹⁴ Its strategic orientations vary over time, and are published on the website.

The OECD currently consists of 35 member countries. The rather stringent membership criteria form one of the OECD's most characterising features, as full participation is only granted to governments of developed countries. The freedom of officials from government agencies or departments to manoeuvre and express their views in the OECD is therefore not entirely uninhibited, as they act as representatives of their governments, rather than spokespersons for their own institutions.²²⁹⁵ However, exactly because OECD recommendations are adopted by governments, they represent powerful tools for advancing competitive principles at government-wide levels.²²⁹⁶ While most member states of the EU are a member,²²⁹⁷ the EU itself is not, but nevertheless regularly participates in the OECD's work as a 'quasi-member'.²²⁹⁸ Countries can also have the status of OECD observer. While the OECD is comprised of developed country governments, its output is not confined to the latter. This limited membership, however, while it has the benefit of gathering countries with a broadly similar attitude, allowing for easier consensus-building, has the drawback that its work-product may not be perceived as legitimate by developing countries, who are deprived of significant input.²²⁹⁹ Concerns about under-inclusiveness played a major part in the creation of the Global Forum on Competition (see below).²³⁰⁰ Even though there have been expansions in the membership, according to PILOLA, the OECD has not been able to formulate a coherent new role for itself.²³⁰¹

OECD decisions are made by consensus by the OECD Council, which consists of one representative per member country, as well as a representative of the European Commission. The Council also meets once a year at ministerial level, to discuss key issues and set priorities.

²²⁹⁴ Ibid.

²²⁹⁵ H. M. Hollman & W. E. Kovacic, "The International Competition Network: Its Past, Current and Future Role" in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 63-64.

²²⁹⁶ R. Brandenburger, "Antitrust enforcement in a network culture: opportunities and challenges in the 21st century" in N. Charbit, E. Ramundo, A. Chehtova, & A. Slater (eds), *William E. Kovacic An Antitrust Tribute, Liber Amicorum – Volume I*, New York, Institute of Competition Law, 2012, 392.

²²⁹⁷ Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden. See <http://www.oecd.org/about/membersandpartners/> (accessed July 2017).

²²⁹⁸ The European Commission takes part in the work of the OECD in accordance with the Supplementary Protocol to the Convention on the Organisation for Economic Co-operation and Development. This participation goes beyond that of a mere observer. Like the member countries, the EU maintains a Permanent Delegation to the OECD, but it does not contribute to the budget, and its representative is not entitled to vote when legal acts are being adopted by the Council. He or she may, however, be elected as a member of the bureau of subsidiary bodies, and participates fully in the preparation of texts, including legal acts, with an unrestricted right to make proposals and suggest changes. See <http://www.oecd.org/eu/european-union-and-oecd.htm> (accessed July 2017).

²²⁹⁹ U. Aydin, "Promoting Competition: European Union and the Global Competition Order", paper prepared for presentation at the European Union Studies Association 11th Biennial International Conference, Los Angeles California, 23-25 April 2009, 9.

²³⁰⁰ H. M. Hollman & W. E. Kovacic, "The International Competition Network: Its Past, Current and Future Role" in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 68.

²³⁰¹ A. Piilola, "Assessing theories of global governance: a case study of international antitrust regulation", *Stanford Journal of International Law*, Vol. 39, 2003, 237.

Representatives meet in specialised committees. There are about 250 committees, working groups and expert groups. The OECD Secretariat carries out the work mandated by the OECD Council and supports the activities of the committees.²³⁰² This a great source of analytical strength, but the size of the OECD's bureaucracy is subject to criticism, as it can significantly slow down the process.²³⁰³

Competition-related work was originally conducted by the Joint Group on Trade and Competition and the Global Forum on Competition. Since the 1990s the Joint Group on Trade and Competition was mandated to study the linkage between trade and competition policy, engaging in consultations with developing countries, business, consumers, other international organisations, and non-governmental organizations. The Joint Group's work fell under the auspices of both the OECD's Trade Committee and Competition Committee, until its mandate was cancelled in 2006. Since then, the Competition Law and Policy Committee forms the primary site for discussions about competition policy within the OECD, providing a variety of means for countries to share their relevant best practices.²³⁰⁴ The primary goals of the Competition Committee are to identify best practices, to foster convergence, and to promote increased cooperation among competition agencies.²³⁰⁵ It consists of representatives of national antitrust enforcement agencies and represents a form of intergovernmental, institutionalized governance, even if its operation is more reminiscent of a trans-governmental network of national competition authorities.²³⁰⁶ The Committee formed the first significant post-World War II international forum for antitrust issues, allowing for information exchange, discussion of experiences, and relationship-building.²³⁰⁷ Participation by senior competition officials and attendance by observers are usually high, and it is widely regarded as one of the most successful OECD committees.²³⁰⁸ The role of the Competition Committee changed somewhat over time. Previously, the work of the Committee largely consisted of periodic examinations of national laws and enforcement systems, collective reports on substantive issues and the adoption of recommendations. The reports were later on replaced by the publication of background papers and member states' contributions to roundtables. During such roundtables delegations as well as external experts present their views on particular issues that were selected based on current competition

²³⁰² See <http://www.oecd.org/about/whodoeswhat/> (accessed July 2017).

²³⁰³ H. M. Hollman & W. E. Kovacic, "The International Competition Network: Its Past, Current and Future Role" in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsels, Intersentia, 2011, 67.

²³⁰⁴ C. Damro, "The new trade politics and EU competition policy: shopping for convergence and co-operation", *Journal of European Public Policy*, Vol. 13, No. 6, September 2006, 876; D. Garza, J. Yarowsky, B. Burchfield, W. S. Cannon, D. Carlton, M. Delrahim, J. Jacobson, D. Kempf, Jr., S. Litvack, J. Shenefield, D. Valentine, J. Warden, *Antitrust Modernization Commission - Report and Recommendations*, April 2007, 216.

²³⁰⁵ R. Brandenburger, "Antitrust enforcement in a network culture: opportunities and challenges in the 21st century" in N. Charbit, E. Ramundo, A. Chehtova, & A. Slater (eds), *William E. Kovacic An Antitrust Tribute, Liber Amicorum – Volume I*, New York, Institute of Competition Law, 2012, 391.

²³⁰⁶ A. Piilola, "Assessing theories of global governance: a case study of international antitrust regulation", *Stanford Journal of International Law*, Vol. 39, 2003, 235.

²³⁰⁷ H. M. Hollman & W. E. Kovacic, "The International Competition Network: Its Past, Current and Future Role" in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsels, Intersentia, 2011, 65.

²³⁰⁸ R. Brandenburger, "Antitrust enforcement in a network culture: opportunities and challenges in the 21st century" in N. Charbit, E. Ramundo, A. Chehtova, & A. Slater (eds), *William E. Kovacic An Antitrust Tribute, Liber Amicorum – Volume I*, New York, Institute of Competition Law, 2012, 392.

interests, ranging from theoretical to practical topics. The secretariat often provides a comprehensive background paper.²³⁰⁹

In 2001 an outreach program in the form of the Global Forum on Competition was founded, which allows around 90 competition agencies, which is far more than the OECD membership, to meet annually and to permit the OECD to expand its expertise beyond its member states, to promote best practices, and to hear non-member views about problems faced by developing economies.²³¹⁰ The World Bank, UNCTAD, and the WTO also participate.²³¹¹ The issue of international cooperation among competition agencies was addressed already during the first Global Forum for merger cases, and again the next year, when it discussed the results of an earlier survey on international cooperation in both merger and cartel investigations.²³¹²

In 2011 the Chairman of the OECD Competition Committee consulted with the delegates concerning long-term strategic planning, and possible themes for the coming two years. In 2012 one of the main topics of the Global Forum was ‘Improving International Co-operation in Cartel Investigations’, indeed as part of a long term strategic project. During this roundtable, representatives from competition agencies, private practice and enforcers from other policy areas, i.e. tax and anti-corruption were heard.²³¹³ The strategic project furthermore included a review and revision of the 1995 Cooperation Recommendation, and identification of other instruments or Committee outputs that could enhance international cooperation between competition agencies as strategic themes for the OECD from 2012 onwards.²³¹⁴

2.1.1.2 Competition-related accomplishments and work product

The OECD has a public webpage entirely dedicated to international cooperation in competition matters.²³¹⁵ It has published extensively on the subject. In 2012, it undertook a stocktaking exercise regarding the Competition Committee’s past work on international cooperation over the past twenty years (going back to 1991 when the work on the recommendations of 1995 started, although some older documents, going back to 1967 are also included).²³¹⁶ The aim was to gather insight on key issues that had already been dealt with, and to better determine the scope of future work. The OECD recommendations on international cooperation were central in the stocktaking exercise. What is peculiar is that while the Committee generally reports to the Council on the application of

²³⁰⁹ R. Brandenburger, “Antitrust enforcement in a network culture: opportunities and challenges in the 21st century” in N. Charbit, E. Ramundo, A. Chehtova, & A. Slater (eds), *William E. Kovacic An Antitrust Tribute, Liber Amicorum – Volume I*, New York, Institute of Competition Law, 2012, 392.

²³¹⁰ Ibid., 393.

²³¹¹ C. Damro, “The new trade politics and EU competition policy: shopping for convergence and co-operation”, *Journal of European Public Policy*, Vol. 13, No. 6, September 2006, 877.

²³¹² An overview of the global fora can be found at <https://www.oecd.org/competition/globalforum/previousglobalforums.htm> (accessed July 2017).

²³¹³ OECD, International Co-operation – Stocktaking Exercise of the Competition Committee’s Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 12.

²³¹⁴ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 18

²³¹⁵ See <http://www.oecd.org/competition/internationalco-operationandcompetition.htm> (accessed July 2017).

²³¹⁶ OECD, International Co-operation – Stocktaking Exercise of the Competition Committee’s Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 3.

recommendations, it did not do so for the recommendations on international cooperation, nor did it review the experiences with the 2005 Best Practices until more recently.²³¹⁷

The most significant output of the OECD in the field of competition law are indeed its Recommendations and Best Practices.²³¹⁸ These instruments, as their name indicates, are not binding. All the key OECD recommendations related to competition law and policy address international cooperation. The 2005 Recommendation on Merger Review, for instance, suggested cooperation and coordination among members in order to avoid inconsistencies in merger review, and suggested to eliminate or reduce impediments standing in the way of this cooperation and coordination. Similarly, the 1998 Recommendation concerning Effective Action against Hard Core Cartels devoted significant attention to the principle of positive comity, and put forward principles on the modalities of cooperation with regard to hard core cartels, including guidance regarding the exchange of both non-confidential and confidential information, as well as investigatory assistance.²³¹⁹ Klawiter and Laciak in 2003 referred to these recommendations as ‘the major international policy statement to date.’²³²⁰ The 1995 Recommendation concerning cooperation between Member Countries on Anticompetitive Practices Affecting International Trade (Recommendation on International Cooperation), however, focuses exclusively on international cooperation.

Globalisation and technological advances have brought international enforcement cooperation back on the policy agenda, which led to the revision and repeal, in 2014, of the 1995 Recommendation on international cooperation (which itself evolved from a first recommendation adopted in 1967). The revision was also part of the follow-up of the OECD/ICN Joint Survey. The 2014 report ‘Challenges of International Co-operation in Competition Law Enforcement’²³²¹ was labelled the first attempt to gather empirical evidence on the need for closer cooperation between enforcers. It provided support to the negotiations of the 2014.²³²² The 2014 Recommendation focuses on offering new and innovative solutions to international enforcement problems. It is divided into two sections, one on information gateways, calling for the adoption of national provisions allowing the exchange of confidential information among competition agencies without prior consent from the source, and another encouraging enhanced cooperation via extensive investigative assistance. Other recommendations include a commitment to effective cooperation, minimising the impact of legislation that might restrict cooperation between competition authorities, strengthened mechanisms of notifications and more flexible means, and increased efforts towards coordination of investigations.²³²³ The new recommendations therefore contain significantly expanded provisions on information exchange, and recommend the adoption of tools to allow the exchange of confidential information.²³²⁴

²³¹⁷ OECD, International Co-operation – Stocktaking Exercise of the Competition Committee’s Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 3-4.

²³¹⁸ See <http://www.oecd.org/daf/competition/recommendations.htm> (accessed July 2017).

²³¹⁹ OECD, International Co-operation – Stocktaking Exercise of the Competition Committee’s Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 5-6.

²³²⁰ D. Klawiter & C. Laciak, “International Competition Cooperation: No Longer Just the Formal Agreements”, *The Antitrust Review of the Americas, A Global Competition Review Special Report*, 2003, 25.

²³²¹ See <http://www.oecd.org/daf/competition/challenges-international-coop-competition-2014.htm> (accessed July 2017).

²³²² See <http://www.oecd.org/competition/internationalco-operationandcompetition.htm> (accessed July 2017).

²³²³ OECD, Recommendation of the OECD Council Concerning International Co-operation on Competition Investigations and Proceedings, C(2014)108, 16 September 2014.

²³²⁴ OECD, Inventory of cooperation agreements, Note by the secretariat, DAG/COMP/WP3(2015)12/REV1, 20 November 2015, 14.

Also worth mentioning are the 2005 OECD best practices for the formal exchange of information between competition authorities in hard core cartel investigations.²³²⁵ These best practices were largely based on former OECD recommendations concerning Co-operation on Anticompetitive Practices Affecting International Trade and Concerning Effective Action Against Hard Core Cartels.²³²⁶ They provide for procedural safeguards for formal exchange of information, in particular concerning confidentiality, use (for other public law enforcement purposes), and disclosure of the information concerned.²³²⁷ It is underlined that a margin of discretion should always be available to the requested jurisdiction. There is no obligation to act on a request, for instance when this would imply a violation of domestic laws or based on public policy concerns. With regard to the protection of the rights of parties under the laws of member countries, such as the legal professional privilege and the privilege against self-incrimination, the best practices state that the higher level of protection should be applied. The best practices advise against giving prior notice to the source of information, unless required by law, because this may disrupt or delay the investigation.²³²⁸ Some have criticised the Best Practices as not being ambitious enough, and “[giving] even more ground to decline a request for information sharing than did the 1995 Recommendations regarding anticompetitive practices affecting international trade [...]”.²³²⁹

The OECD has conducted several surveys on international cooperation.²³³⁰ The authority of the OECD guarantees response rates that cannot easily be obtained by smaller organisations. The reports analysing the results of these surveys help understand past and current practice, indicate areas of improvement, and help predict future tendencies. They also inquire about the usefulness and implementation of the OECD recommendations and best practices, and can provide the basis for draft Council Recommendations.²³³¹

As mentioned throughout this study, the OECD also engaged in a joint survey with the ICN on ‘International Enforcement Co-operation – Status Quo and Areas for Improvement’. Because the OECD’s strategic project regarding international competition cooperation coincided with the ICN project on international enforcement cooperation, “the Competition Committee asked the Secretariat to coordinate with the ICN on a single questionnaire that would support the needs of both the OECD Competition Committee’s long-term project on International Co-operation and the ICN Steering Group project on International

²³²⁵ OECD, Best Practices for the formal exchange of information between competition authorities in hard core cartel investigations, 2005.

²³²⁶ OECD, Revised recommendation of the Council Concerning Co-operation between Member countries on Anticompetitive Practices affecting International Trade 1995, C(95)130/FINAL & OECD, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels, 1998, C(98)35/FINAL respectively, OECD, International Co-operation – Stocktaking Exercise of the Competition Committee’s Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 6.

²³²⁷ M. Blachucki & S. Józwiak, “Exchange of Information and Evidence between Competition Authorities and Entrepreneurs’ Rights”, *Yearbook of Antitrust and Regulatory Studies*, Vol. 5, No. 6, 2012, 153.

²³²⁸ OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Background Note, DAF/COMP/GF(2012)6, 13 February 2012, 11-12.

²³²⁹ N. Ormonov, “Exchange of Information in the Enforcement of Antitrust Laws”, *Asper Review of International Business & Trade Law*, Vol. 6, 2006, pp. 343-378, 358.

²³³⁰ OECD, Global Forum on Competition, Improving International Co-operation in Cartel Investigations, Background Note, DAF/COMP/GF(2012)6, 13 February 2012, 10.

²³³¹ OECD, International Co-operation – Stocktaking Exercise of the Competition Committee’s Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 35-36.

*Enforcement Co-operation.*²³³² The Survey was addressed to all the ICN member agencies, which include all agencies of OECD member and observer countries, amounting to 120 competition agencies all over the globe. It was launched in July 2012, with responses due in September of the same year. A total of fifty-seven responses were sent to the OECD Secretariat. The response rate among OECD members and observers was around 90%, while the ICN member response rate amounted to 47%. 55% Of responses were received from European competition agencies. The main objectives of the survey were to gain an understanding of the experiences of competition agencies with international cooperation in case-related enforcement activities, and to elicit the opinions of respondents on several related topics, in particular in view of future ICN and OECD work.²³³³ The OECD/ICN Joint Survey offers a broad picture of international enforcement cooperation. It engaged in a qualitative assessment of international cooperation, instructed about the different legal bases for formal cooperation and the experiences with it, it provided information over the frequency of cooperation, elaborated on regional and multilateral cooperation, addressed limitations and constraints on international cooperation, focused on the exchange of information and confidentiality waivers, and finally it engaged in self-reflection by informing about the OECD's role in fostering international cooperation and inquiring about possible areas of improvement and future work for the OECD.

Most recently, in 2015, the OECD Competition Committee created an inventory of international cooperation agreements. It focuses on fifteen bilateral agreements where at least one of the signatories is an OECD country. MoUs or agency-to-agency agreements are listed separately but do not form the focus of the inventory. In the inventory useful options can be found for the negotiation or interpretation of competition cooperation agreements. It can be considered as a catalogue of provisions in existing cooperation agreement. Along with each section of the inventory, the relevant provision of the 2014 OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings is mentioned, as well as a list of the relevant clauses out of the scrutinised agreements.²³³⁴ This rather extensive work on bilateral agreements indicates the continued belief in this form of cooperation and demonstrates the interplay between international OECD guidelines and bilateral cooperation agreements. With the creation of the inventory, the OECD somewhat catered to the request (that had surfaced from the joint survey) to develop a model bilateral or multilateral cooperation agreement.²³³⁵

Another type of instrument issued by the OECD aiding convergence and cooperation is its in-depth Peer Reviews & Country Reports of national competition laws and policies.²³³⁶ The OECD has conducted these reviews since 1998. While the US' competition laws were the first to be reviewed, all OECD members have been peer reviewed at least once, as well as many observers to the Competition Committee, on a voluntary basis.²³³⁷ The in-depth peer reviews provide valuable insights into areas for improvement. They assess how countries deal with competition and regulatory issues

²³³² OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 19.

²³³³ Ibid., 6, 19.

²³³⁴ OECD, Inventory of co-operation agreements, Note by the secretariat, DAF/COMP/WP3(2015)12/REV1, 20 November 2015.

²³³⁵ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 16.

²³³⁶ See <http://www.oecd.org/competition/countryreviewsofcompetitionpolicyframeworks.htm> (accessed July 2017).

²³³⁷ R. Brandenburger, "Antitrust enforcement in a network culture: opportunities and challenges in the 21st century" in N. Charbit, E. Ramundo, A. Chehtova, & A. Slater (eds), *William E. Kovacic An Antitrust Tribute, Liber Amicorum – Volume I*, New York, Institute of Competition Law, 2012, 392.

in a broad sense, ranging from the soundness of competition laws to the structure and effectiveness of competition institutions. The detailed country reports are then peer reviewed before they are published. While the peer reviews do not contain a completely uninhibited assessment of the examinee's legislation and institutes due to the nature of the OECD membership, the 'airbrushing' nevertheless does not undermine the value of the exercise.²³³⁸ Peer assessment reports typically include recommendations for changes in legislation or policy, and quickly become part of the national public debate. The Reports are part of the OECD's Horizontal Programme on Regulatory Reform,²³³⁹ which in turn is part of the OECD's efforts to build a common base of experience and encourage the adoption of superior techniques.²³⁴⁰ The OECD indeed has established an 'Outreach Program' intended to assist developing countries with broad-based regulatory reform. Another part of this program consists of allowing representatives from developing countries to attend OECD Competition Committee meetings and providing assistance in the development of legislation and institutions, including the training of officials, and the implementation and enforcement of their competition policies.²³⁴¹ Peer reviews are also conducted by other competition policy networks, such as UNCTAD.²³⁴²

Finally, not all OECD work results in recommendations or best practices. Such discussions are nevertheless very useful to elevate the knowledge base and can have an equally significant impact.²³⁴³ With regard to international cooperation, the example of the 1999 Report on Positive Comity, or the 2013 discussion on remedies in cross-border merger cases can be mentioned.

2.1.1.3 Implementation

While the recommendations and best practices are valuable instruments on their own, their main merit lies in the extent to which they are implemented. With regard to the implementation of the most important recommendations the OECD has itself issued reports. It concerns the recommendations dealing with bid rigging in public procurement, competition assessment, merger review, and hard core cartels.²³⁴⁴ Information on implementation can also become apparent in the surveys that are occasionally undertaken.

While it is confirmed that the OECD plays an important role in shaping the framework for international enforcement cooperation, implementation varies from one document to another. The OECD/ICN Joint Survey for instance revealed that the 2005 OECD Recommendation on International Cooperation played a more effective role than the 2005 Best Practices on the exchange

²³³⁸ H. M. Hollman & W. E. Kovacic, "The International Competition Network: Its Past, Current and Future Role" in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsels, Intersentia, 2011, 66.

²³³⁹ See <http://www.oecd.org/competition/abuse/countryreviewsofcompetitionpolicyframeworks.htm> (accessed July 2017).

²³⁴⁰ H. M. Hollman & W. E. Kovacic, "The International Competition Network: Its Past, Current and Future Role" in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsels, Intersentia, 2011, 65.

²³⁴¹ A. Piilola, "Assessing theories of global governance: a case study of international antitrust regulation", *Stanford Journal of International Law*, Vol. 39, 2003, 243.

²³⁴² H. M. Hollman & W. E. Kovacic, "The International Competition Network: Its Past, Current and Future Role" in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsels, Intersentia, 2011, 66.

²³⁴³ See <http://www.oecd.org/daf/competition/internationalco-operationandcompetition.htm> (accessed July 2017).

²³⁴⁴ See <http://www.oecd.org/daf/competition/reportsbythecompetitioncommittee.htm> (accessed July 2017).

of information in cartel investigations.²³⁴⁵ The recommendations on hard core cartels mainly played a role with regard to the individual enforcement programs of the member states, while the call for cooperation was responded to much less.²³⁴⁶ It is remarkable that even though the 2005 Best Practices are widely regarded as successful, the OECD/ICN Joint Survey revealed that the majority of respondents reported a lack of experience with the Best Practices or simply did not answer this question.²³⁴⁷

As mentioned, experiences with implementation may lead to suggestions for reform. The ICN/OECD Joint Survey allowed some members to identify areas for improvement regarding the 1995 Recommendations, in particular to make it reflect the current status of international cooperation. Some suggestions related to implementation specifically, namely that the OECD should encourage greater compliance and that members should be stimulated to make more use of the Recommendations. Linked to this it was also suggested that the effectiveness of the Recommendation could be improved by more regular monitoring of experiences with it.²³⁴⁸

2.1.1.6 Future: focus on solutions rather than challenges

The OECD will remain an important player in international competition law and policy development. It is important that it keeps following-up on its existing instruments. The main requests towards the OECD emerging from the Joint Survey was to update the existing OECD instruments to align them with current practice and needs.²³⁴⁹ As an example, STEENBERGEN mentioned the necessity to update guidelines with regard to simplified procedures, which are currently not mentioned, despite their widespread use.²³⁵⁰

Comments from OECD member countries in the ICN/OECD Joint Survey regarding projects which should have a ‘high priority’ indicated a preference for the development of model cooperation instruments and/or agreements. Many respondents underlined that the OECD should focus on its specific strength, namely that it consists of governments, therefore is well placed to deal with legal obstacles to effective cooperation.²³⁵¹ This call for action is not that surprising. The OECD Competition Committee has devoted significant attention to identifying the *challenges* that international competition cooperation faces, both legal and practical. The next step should now be to analyse in a more focused manner the possible *solutions*, which so far have been ignored to a large extent. Some challenges have been repeatedly identified, but no practical solutions have come forward that go beyond vague principles.²³⁵² As was stated in the stocktaking exercise, the inability to

²³⁴⁵ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 14.

²³⁴⁶ OECD, International Co-operation – Stocktaking Exercise of the Competition Committee’s Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 28.

²³⁴⁷ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 108.

²³⁴⁸ Ibid., 106-107.

²³⁴⁹ Ibid., 16.

²³⁵⁰ J. Steenbergen, “Keynote address: defining the new frontiers of merger control regimes: what’s on the regulators’ radar”, “Crossing Merger Control Frontiers: What are the new borders?”, 3rd Annual conference organized by Concurrences and Paul Hastings, Paris, 30 October 2015: Brochure.

²³⁵¹ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 119.

²³⁵² Already in 1992 the Whish-Wood Report offered recommendations on the improvement of coordination and the alignment of procedures in merger cases, upon which an agreed ‘Framework for a Notification Form’ was issued. The

engage in information sharing for instance is repeatedly identified as the one constraint that limits international cooperation, “*despite the many sessions devoted to addressing this sensitive issue over a long period of time.*”²³⁵³ The lack of an internationally accepted definition of ‘confidential information’, is another example of an issue that is since long indicated as an obstacle for international cooperation, but was never fully addressed by the Committee (see above, Part II, 3.4). While there has been a discussion on how to define confidential information, no analysis of the different existing approaches was done and no recommendations were made.²³⁵⁴ More analytical work could be done on the definitions used in different jurisdictions and on the different rules regarding protection of such confidential information, rather than merely providing an overview.²³⁵⁵

While it will be suggested later in this study that more cooperation should take place among the different multilateral forums where competition policy discussions take place (see below, Part III.2.2.2), cooperation *within* the OECD should be increased as well. Currently there is relatively little interaction among the different OECD committees. Some consultation takes place, but committee members are not closely involved, and there is little awareness about what each committee is dealing with. More interaction and cross-fertilisation could lead to the creation of synergies, as there are pools of knowledge that currently remain untouched, such as, for instance, the work done in the Global Forum on Transparency and Exchange of Information for Tax Purposes.²³⁵⁶ It is finally suggested that the OECD open up its membership. Any instrument developed without significant developing country input is necessarily flawed from the start in its ambitions to become a global standard.²³⁵⁷

2.1.2 WTO: trade and competition

The latest attempt to include competition law issues in the framework of the World Trade Organisation was discussed earlier (see above, Part I, 3.3.3). What will be addressed here is whether there is any reason to believe that the WTO is a suitable venue to host international cooperation in the field of competition law to begin with. The WTO, established in Geneva in 1995, proclaims that it is the only global international organization dealing with the rules of trade between nations. It is run by its member governments. All major decisions are made by the membership as a whole, either by ministers or by their ambassadors or delegates. It has a secretariat with a staff of 640 persons. Its functions include the administering WTO trade agreements, providing a forum for trade

aim of the Wish-Wood Report was to be more empirical. The Report asked for increased general cooperation, and more clear guidelines on how to implement the OECD recommendation of 1986 (valid at the time). It also recommended the establishment of a waiver system and requested that member states would commit to develop national confidentiality guidelines, for internal as well as public dissemination. It required the parties to notify other agencies, and promoted more efficient dissemination of information in the public domain. Furthermore, one or two model filing forms should be created according to the report, *“which request common information in a single format, and which use different country annexes as appropriate.”* Finally, harmonization of deadlines was encouraged. (OECD, International Co-operation – Stocktaking Exercise of the Competition Committee’s Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 9, 23. See OECD, Whish-Wood Report, DAF/CLP/WP3(93)6/PART1, 1994).

²³⁵³ OECD, International Co-operation – Stocktaking Exercise of the Competition Committee’s Past Work, DAF/COMP/WP3(2012)5, 12 June 2012, 15.

²³⁵⁴ Ibid., 15.

²³⁵⁵ OECD, Discussion on Limitations and Constraints to International Co-operation, Contribution of the European Union, DAF/COMP/WP3/WD(2012)41, 23 October 2012, 4.

²³⁵⁶ See <http://www.oecd.org/tax/transparency/automaticexchangeofinformation.htm> (accessed July 2017).

²³⁵⁷ A. Piilola, "Assessing theories of global governance: a case study of international antitrust regulation", *Stanford Journal of International Law*, Vol. 39, 2003, 249.

negotiations, handling trade disputes, monitoring national trade policies, providing technical assistance and training for developing countries, and cooperating with other international organizations.²³⁵⁸ The Secretariat is headed by a Director-General. It has no decision-making powers as decisions are taken by Members only. It mainly supplies technical and professional support for the various councils and committees, and to developing countries, and monitors and analyses developments in world trade. It moreover provides information to the public and the media and organizes the ministerial conferences. The Secretariat also provides legal assistance in the dispute settlement process and advises governments that want to become WTO Members. The WTO currently has 164 members, developed as well as developing and least developed countries. 21 More countries have observer status. The EU is a full member as well as all the EU member states. The European Commission speaks for all EU member States at almost all WTO meetings.²³⁵⁹

It is remarkable that in the study of the European Parliament for the Econ Committee in 2015 that listed the priorities for EU competition policy, the WTO was not mentioned in the section on engagement in multilateral forum.²³⁶⁰ At the same time, however, in the opinion of the Committee on International Trade regarding the proposal for a Council decision on the conclusion of the EU-Switzerland second generation Agreement, it was stated that “[s]ooner rather than later the WTO will have to return to competition policy and use multilateral instruments to fight these practices with transborder consequences to create a level playing field.”²³⁶¹ The EU itself therefore does not seem determined on which way it wishes to go regarding the WTO and competition law.

2.1.2.1 Existing WTO competition provisions and cases

While much debate exists on whether a future competition law agreement should be included in the framework of the WTO and if so what that agreement should look like, the WTO legal framework is currently not void of competition provisions.²³⁶² Such provisions are largely aimed at governmental actions, namely avoiding reciprocal tariff concessions by disguised means. Competition law should then be taken into consideration where anticompetitive behaviour hinders trade objectives. Often the competition provisions are sectorial and limited in nature. A generic obligation to regulate international anticompetitive behaviour is absent. Existing competition provisions in the WTO are therefore applied ad hoc, in a localised and inconsistent manner. There is no overall ‘policy’ to be detected.²³⁶³

²³⁵⁸ See https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (accessed July 2017).

²³⁵⁹ See https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm (accessed July 2017).

²³⁶⁰ European Parliament, Directorate-General for Internal Policies, Policy Department A – Economic and Scientific Policy, Competition Policy in International Agreements – Study for Econ Committee, IP/A/ECON/2015-02, August 2015, 27.

²³⁶¹ Opinion of the Committee on International Trade for the Committee on Economic and Monetary Affairs on the proposal for a Council decision on the conclusion of an Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, 12418/2012 – C7-0146/2013 – 2012/0127(NLE), 17 December 2013.

²³⁶² An overview can be found in M. Taylor, *International competition law – A new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 160-162. Competition provisions can be found in the GATT, as well as in TRIPS, the General Agreement on Trade in Services (GATS), and the ‘Reference Paper’ which complements the WTO Telecommunications Agreement. (A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 245).

²³⁶³ Ibid., 162-163.

While some claim that there is a historic precedent to include competition policy into the WTO, this argument can be countered. The GATT for instance, intended to be an interim measure, was less comprehensive in scope than the Havana Charter and did not contain any provisions addressing anticompetitive trade practices, nor did it mention any linkage between competition and trade law. It did contain modest provisions on discriminatory customs valuation procedures, government procurement practices, and subsidies. Subsequent efforts to incorporate competition law into the GATT failed, consistently due to insufficient international consensus.²³⁶⁴

The most infamous competition dispute settlement case dealt with within the ambit of the WTO is the *Photographic Film* case.²³⁶⁵ It represents the furthest extent to which private anti-competitive activity was challenged within the context of generic WTO obligations.²³⁶⁶ The case highlighted the deficiencies of the WTO legal framework in dealing with private restraints on international trade.²³⁶⁷ In this case the US Government Office of the Trade Representative, at the petition of the Eastman Kodak Company of the United States (Kodak), accused Japan of violating GATT rules because it deliberately did not correctly enforce its competition laws against Fuji Film Company. Because of this Fuji could maintain its exclusive distribution agreements, which caused market entry issues for American competitors to the Japanese distribution system for photographic film and paper and therefore constituted an impermissible trade barrier.²³⁶⁸ The claim had to be directed towards Japan, tolerating inefficient retail distribution networks impeding the entry of foreign products, rather than the companies themselves.²³⁶⁹ The US turned to the WTO because it had no jurisdiction to apply its own laws extraterritorially.²³⁷⁰ The case was very complex in its facts, with the final WTO Panel Report amounting to more than 500 pages.²³⁷¹ The US made three factual allegations that the Japanese government had directly or indirectly introduced measures that prevented Kodak from entering the Japanese market, and based its claim for dispute settlement on three distinct legal

²³⁶⁴ Ibid., 153-155, 159, 183.

²³⁶⁵ WTO, DS44: Japan — Measures Affecting Consumer Photographic Film and Paper, 22 April 1998. Other cases exist but are sectorial in nature. See M. Taylor, *International competition law – A new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 192. One such sectorial case is the *Telmex* Case. This case revolved around “the privilege granted by Mexican legislation to the dominant telecommunications company, Telmex, to fix the rate to be paid by all foreign carriers terminating calls in Mexico.” (A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 247) The US accused Mexico of breaching its obligations under the Reference Paper complementing the WTO Telecommunications Agreement. The WTO panel discussed market definition, the concept of ‘major supplier’, and expanded the definition of anti-competitive practices. (S. Singh “The Telmex Dispute at the WTO: Competition Makes a Backdoor Entry”, *CUTS Briefing Paper*, No. 1/2006.) The WTO panel concluded that Mexico infringed its obligations under the Reference Paper “as it failed to maintain appropriate measures to prevent anticompetitive practices by a firm that was a ‘major supplier’, it failed to ensure interconnection at cost-oriented rates [to foreign service suppliers], and it also failed to ensure reasonable and non-discriminatory access and use of telecommunications networks.” (A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 247.

²³⁶⁶ M. Taylor, *International competition law – A new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 192.

²³⁶⁷ See P. Stephan, “Global Governance, Antitrust, and the Limits of Cooperation”, *Cornell International Law Journal*, Vol. 38, 2005, 200.

²³⁶⁸ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 186. M. Taylor, *International competition law – A new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 191-192.

²³⁶⁹ P. Stephan, “Global Governance, Antitrust, and the Limits of Cooperation”, *Cornell International Law Journal*, Vol. 38, 2005, 200.

²³⁷⁰ M. Taylor, *International competition law – A new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 192.

²³⁷¹ P. Stephan, “Global Governance, Antitrust, and the Limits of Cooperation”, *Cornell International Law Journal*, Vol. 38, 2005, 200. For a more detailed overview of the case, see M. Taylor, *International competition law – A new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 192-201.

grounds.²³⁷² Of those claims, the ones relevant to competition law included a failure by Japan to provide national treatment to imported (US) film, constituting a direct violation of Article III.4 of the GATT,²³⁷³ and that Japan had ‘nullified or impaired’ a WTO tariff concession under Article XXIII.1(b) of the GATT.²³⁷⁴ While this case relates to anticompetitive behaviour, the US did not expressly refer to such behaviour by Fuji, considering a negative finding of the JFTC and the fact that no WTO obligations existed prohibiting such behaviour. Implicitly, however, allegations of anti-competitive exclusive dealing and vertical foreclosure can be detected.²³⁷⁵ The WTO Panel ruled that GATT rules had not been breached. The reasoning was that the actual competition laws of Japan did not discriminate against firms because even if there was restricted market access, such restrictions equally affected both domestic and foreign firms. This is where it becomes clear that existing WTO legislation has problems dealing with private firm behaviour. The discrimination here was being carried out by Fuji, a private enterprise, against which general WTO law was of no use, except in very particular cases, such as monopoly service suppliers that are obliged to abide with the national treatment obligation and should refrain from abusing their monopoly position in areas where the WTO Member has made specific liberalization commitments or in the context of intellectual property rights.²³⁷⁶ This form of disguised protection is therefore difficult to tackle in a WTO context.²³⁷⁷

2.1.2.2 Arguments pro inclusion

While it is necessary to provide an overview of the benefits and drawbacks, this section will not enter into detail, as the issue of including competition issues in a WTO context has been widely discussed already. Important proponents are GUZMAN and TAYLOR for instance, contrary to the opinions of FOX or TARULLO.²³⁷⁸

As mentioned, future attempts at integrating competition law provisions in the WTO may be more viable due to the efforts made via FTAs (see above, Part III, 1.4.1.4), and the fact that many jurisdictions are more comfortable with competition law enforcement than at the time the Singapore issues were introduced.²³⁷⁹ Some claim, moreover, that export cartels and import cartels represent

²³⁷² M. Taylor, *International competition law – A new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 192.

²³⁷³ “The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.”

²³⁷⁴ “If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement”.

²³⁷⁵ M. Taylor, *International competition law – A new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 193-194.

²³⁷⁶ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 186.

²³⁷⁷ P. Stephan, “Global Governance, Antitrust, and the Limits of Cooperation”, *Cornell International Law Journal*, Vol. 38, 2005, 200; M. Taylor, *International competition law – A new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 197.

²³⁷⁸ A. Guzman, “International competition law” in A. Guzman & A. Sykes (eds), *Research Handbook in International Economic Law*, Cheltenham, Edward Elgar Publishing, 2007, 440. For an overview of some other academics in favour of a WTO competition agreement, see N. Ormonov, “Exchange of Information in the Enforcement of Antitrust Laws”, *Asper Review of International Business & Trade Law*, Vol. 6, 2006, 369.

²³⁷⁹ However, the drawbacks mentioned in that context are valid in the context of the WTO as well.

political economy problems and in this sense reflect the trade dilemma. They point to the fact that the non-discrimination obligations central to the WTO Agreements are in fact heavily imbued with competition-related concerns, as they help ensure the equality of competitive conditions between foreign and domestic suppliers.²³⁸⁰ It is therefore argued that inherently the solution for international competition issues remains within the WTO.²³⁸¹ PIILOLA is of the opinion that the interdependence between antitrust and trade policy requires that the implications of one policy regime *vis-à-vis* the other should be carefully considered and that the inclusion of antitrust law and policy into the WTO would allow for a greater coordination in that regard.²³⁸² TAYLOR similarly believes that synergies in both underlying theory and policy coordination would be realised.²³⁸³ The fact that trade and competition are interlinked, does not mean, however, that they should be dealt with by the same institution. As mentioned, while they interact and sometimes their goals overlap, they nevertheless pursue different objectives (see above, Part III, 1.3.2.2).

The WTO setting indeed offers the possibility to negotiate several issues at once. This allows for issue linkages and trade-offs. Some claim that “[t]his ability to negotiate a range of topics is crucial in achieving an international antitrust agreement because it reduces transaction costs which, in turn, increases the likelihood that the parties will reach the optimal result.”²³⁸⁴ The setting of the WTO would also be conducive to allowing transfer payments.²³⁸⁵ As mentioned, however (see above, Part III, 1.3.2.1), these linkages are a liability as much as a benefit. If the WTO moreover responds to requests to increase its responsiveness to the concerns of citizens’ groups and to act more openly, it will inevitably be hindered by inconsistent political demands and difficult choices. One solution is then to exclude issues of ‘high’ policy, and limit WTO activities to regulatory and technical problems with regard to opening markets and safeguarding principles of fairness and due process.²³⁸⁶

The broad membership and experience of the WTO in successfully managing the negotiation and implementation of complex international agreements are yet other benefits attributed to the WTO as forum for competition law issues.²³⁸⁷ In the same line the respect and confidence of the international community enjoyed by the WTO institutions are mentioned, even if the WTO is not free of criticism, regarding for instance its membership and legitimacy.²³⁸⁸

2.1.2.3 Arguments contra inclusion

²³⁸⁰ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 185.

²³⁸¹ Brendan Sweeney, work in progress, 60-62.

²³⁸² A. Piilola, “Assessing theories of global governance: a case study of international antitrust regulation”, *Stanford Journal of International Law*, Vol. 39, 2003, 231.

²³⁸³ M. Taylor, *International competition law – A new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 334.

²³⁸⁴ A. Guzman, “International competition law” in A. Guzman & Alan O. Sykes (eds), *Research Handbook in International Economic Law*, Cheltenham, Edward Elgar Publishing, 2007, 441.

²³⁸⁵ A. Piilola, “Assessing theories of global governance: a case study of international antitrust regulation”, *Stanford Journal of International Law*, Vol. 39, 2003, 232.

²³⁸⁶ P. Gallagher, *The first ten years of the WTO 1995-2005*, Cambridge, Cambridge University Press, 2005, 137.

²³⁸⁷ A. Piilola, “Assessing theories of global governance: a case study of international antitrust regulation”, *Stanford Journal of International Law*, Vol. 39, 2003, 231.

²³⁸⁸ M. Taylor, *International competition law – A new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 334. Also see A. Piilola, “Assessing theories of global governance: a case study of international antitrust regulation”, *Stanford Journal of International Law*, Vol. 39, 2003, 234.

So while there are benefits to including competition law issues in the WTO, far more compelling reasons exist to exclude it. A first one is that the WTO has experience with restrictions imposed by the state, not those resulting from private behaviour.²³⁸⁹ The rather adversarial character of the WTO renders it somewhat inappropriate for fostering cooperation among states. The WTO has experience in eliminating certain government activities, not coordinating them. The WTO's adversarial tradition could even undermine the bonds of trust already formed among national antitrust authorities and crucial to cooperation. It should be mentioned, however, that such argumentation should take into account the extent to which disputes are resolved informally in the WTO.²³⁹⁰ The culture of political bargaining present at the WTO is equally at odds with the decision-making practices common in the field of international competition. Rather than finding solution in WTO action, many international competition law enforcement issues require a cooperative solution.²³⁹¹

The incorporation of an international competition agreement into the WTO would require a consensus decision of the WTO members. This in turn has an impact on the content of such an agreement.²³⁹² The most likely outcome of an international competition agreement would be in the form of core-principles, such as non-discrimination, transparency, procedural fairness, provisions on hardcore cartels, and perhaps some modalities for voluntary cooperation. Multilaterally achieving a binding agreement on matters with broad social and economic impact throughout all levels of government is deemed to be a slow and difficult process.²³⁹³ One may then wonder whether the effort of negotiating and monitoring such an agreement will be worth the very limited benefits.²³⁹⁴ It can be doubted whether such minimum standards would do any good. The complexity of the international environment will remain largely the same, and countries already complying will not be motivated to go any further.²³⁹⁵ Moreover, to get developing countries on board, investments will first need to be made in terms of capacity building. The competition provisions in the WTO agreements as they stand are insufficient in any case, and their sectorial nature, and the case-specific analysis based on sector-specific competition provisions in the cases that have already occurred, might lead to an inconsistent competition policy across sectors.²³⁹⁶ According to SINGH, as it stands, the WTO dispute settlement bodies “cannot responsibly tackle the problems of anti-competitive practices in a satisfactory manner”, as he believes “that the stretching of judicial creation runs the risk of undermining the legitimacy and integrity of the WTO.”²³⁹⁷

At the occasion of the *Telmex* case mentioned above, MARSDEN pointed to some other shortcomings of the WTO-environment for resolving competition issues. He first underlined the lack of expertise

²³⁸⁹ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 185.

²³⁹⁰ I. Maher, “Competition law in the international domain: networks as a new form of governance”, *Journal of Law and Society*, Vol. 29, No. 1, March 2002, 129-130.

²³⁹¹ A. Piilola, “Assessing theories of global governance: a case study of international antitrust regulation”, *Stanford Journal of International Law*, Vol. 39, 2003, 233-234, 238.

²³⁹² M. Taylor, *International competition law – A new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 421.

²³⁹³ P. Gallagher, *The first ten years of the WTO 1995-2005*, Cambridge, Cambridge University Press, 2005, 137.

²³⁹⁴ A. Guzman, “International competition law” in A. Guzman & A. Sykes (eds), *Research Handbook in International Economic Law*, Cheltenham, Edward Elgar Publishing, 2007, 440.

²³⁹⁵ M. Taylor, *International competition law – A new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 354.

²³⁹⁶ A. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, Cambridge, Cambridge University Press, 2010, 247.

²³⁹⁷ S. Singh “The *Telmex* Dispute at the WTO: Competition Makes a Backdoor Entry”, *CUTS Briefing Paper*, No. 1/2006.

WTO panels with regard to competition matters. Second, the fact that panels should not upset the ‘security and predictability’ of the multilateral trading system prevents them from adding to or diminishing the rights and obligations in the agreements. Panels according to Marsden take to what is perceived as ‘the safest route’. Cases also provide little precedent value, as the panel report in the *Telmex* case for instance stated clearly that its findings apply solely to the specific case of Mexico brought before it.²³⁹⁸

2.1.2.4 Future: stick to trade

In conclusion, it is highly unlikely that the heavy WTO law-making process will lead to the creation of a competition law agreement in the near or even mid-term future. If anything, the most likely outcome would be minimum harmonisation of certain core principles. This would not resolve any of the real life problems currently plaguing international competition law enforcement. The sense of urgency that could potentially push through agenda-setting and negotiations is moreover lacking.

2.1.3 UNCTAD: development and competition

2.1.3.1 Origins & membership

The United Nations Conference on Trade and Development was established by the United Nations General Assembly in 1964 as a permanent intergovernmental body. Its headquarters are located in Geneva, and additional offices exist in New York and Addis Ababa. Institutionally UNCTAD is part of the UN Secretariat as well as the United Nations Development Group, reporting to the UN General Assembly and the Economic and Social Council. It does however has its own membership, leadership, and budget. The goal is to create prosperity for the citizens of the 194 member countries²³⁹⁹ Because UNCTAD is an intergovernmental institution, the EU itself is not a full member, but enjoys observer status.²⁴⁰⁰ All EU member states are members, however. The UNCTAD competition policy secretariat’s core function is to support UNCTAD’s technical assistance program. It is comprised of approximately ten professionals. Often they are employed on short-term renewable contracts, which may have the effect of impeding the recruitment and retention of capable staff.²⁴⁰¹

Focus is on supporting developing countries to reap the benefits of a globalized economy more fairly and effectively as well as helping them to properly deal with the potential drawbacks. This happens via research, data-collection, analysis, consultation, information-sharing, consensus-building, technical assistance, and capacity-building.²⁴⁰² Trade, investment, finance, and technology are seen as vehicles for inclusive and sustainable development. Curbing regulations that stifle competition is explicitly mentioned among the means to reach that goal.²⁴⁰³ As mentioned (see above, Part I, 3.3.2),

²³⁹⁸ Ibid.

²³⁹⁹ See <http://unctad.org/en/Pages/aboutus.aspx> (accessed July 2017).

²⁴⁰⁰ C. Damro, “The new trade politics and EU competition policy: shopping for convergence and co-operation”, *Journal of European Public Policy*, Vol. 13, No. 6, September 2006, 875.

²⁴⁰¹ H. M. Hollman & W. E. Kovacic, “The International Competition Network: Its Past, Current and Future Role” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsels, Intersentia, 2011, 71.

²⁴⁰² C. Damro, “The new trade politics and EU competition policy: shopping for convergence and co-operation”, *Journal of European Public Policy*, Vol. 13, No. 6, September 2006, 875.

²⁴⁰³ See <http://unctad.org/en/Pages/aboutus.aspx> (accessed July 2017).

in the 1970s, a ‘New International Economic Order’ was suggested by UNCTAD, aimed at creating an economically more fair environment for developing countries. Among the topics discussed were restrictive business practices, including the application of competition law.²⁴⁰⁴

2.1.3.2 Accomplishments

The main work of UNCTAD on competition policy is ‘the Set’ (see above, Part I, 3.3.2) However, this is not the only type of competition-related output of UNCTAD. It also engages in country reviews. The example of Ukraine can be mentioned where the UNCTAD peer review led to major changes to the competition law system, and whereby UNCTAD helped provide the template for the changes.²⁴⁰⁵ More generally the work is very similar to that of the OECD, but with a clear focus on development.

The Competition and Consumer Policies Programme services the Intergovernmental Group of Experts on Competition Law and Policy as well as the Ad-hoc Expert Group meeting on Consumer protection policies every year. It also undertakes competition policy peer reviews, publishes the UNCTAD Model law on competition and the Handbook on competition legislation, and implements sector specific and economy-wide competition and consumer policies reforms. The highest intergovernmental bodies are the Review Conferences to appraise the Set on Competition policy every five years.²⁴⁰⁶ The most recent one, the Seventh UN Review Conference, took place in 2015, marking the 35th anniversary of the adoption of the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices.²⁴⁰⁷ During these reviews, inter alia future work programmes are endorsed and shaped, and resolutions are adopted.²⁴⁰⁸

2.1.3.3 Future: increasing importance

UNCTADs role will likely only increase in the future. Its development-perspective is unique. It has political clout considering its role as de facto agent for the interests of developing and least developed countries. In the development of multilateral rules, UNCTAD’s input will be crucial in assisting and resourcing developing countries.²⁴⁰⁹ The engagement of developing countries in several multilateral forums indeed causes resource-problems. Newer agencies will often lack the resources to assign multiple people to international relations issues, or support frequent travel costs. Both the OECD and UNCTAD have the capacity to offer supporting travel funds for less wealthy authorities.²⁴¹⁰

²⁴⁰⁴ H. M. Hollman & W. E. Kovacic, “The International Competition Network: Its Past, Current and Future Role” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsels, Intersentia, 2011, 68-69.

²⁴⁰⁵ “Crossing Merger Control Frontiers: What are the new borders?”, 3rd Annual conference organized by Concurrences and Paul Hastings, Paris, 30 October 2015.

²⁴⁰⁶ See <http://unctad.org/en/Pages/DITC/CompetitionLaw/Competition-Law-and-Policy.aspx> (accessed July 2017).

²⁴⁰⁷ See <http://unctad.org/en/conferences/UN-Set/7th-Review/Pages/home.aspx> (accessed July 2017).

²⁴⁰⁸ Seventh United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Geneva, 6–10 July 2015.

²⁴⁰⁹ M. Taylor, *International Competition Law: a New Dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 132.

²⁴¹⁰ H. M. Hollman & W. E. Kovacic, “The International Competition Network: Its Past, Current and Future Role” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsels, Intersentia, 2011, 71.

2.1.4 ICN: virtual giant

2.1.4.1 Origins, membership, functioning: an inclusive, virtual network

A) Origins

The International Competition Network was created upon incentive of the US. As a reaction to developments within the WTO, the Department of Justice under the CLINTON administration convened the International Competition Policy Advisory Committee (ICPAC) in 1997 to study the implications of globalisation on international antitrust policy and enforcement. It focused among other things on issues such as multi-jurisdictional merger review, the interface between trade and competition, and the future direction for interagency-cooperation. The Committee issued its report in 2000, which contained the foundations for the ICN.²⁴¹¹ Rather than incorporating competition issues in a binding WTO-framework, a more cooperative, voluntary network approach was suggested as alternative route. ICPAC encouraged the US to consider the creation of a ‘Global Competition Initiative’ that would offer a forum where government officials, private actors and non-governmental organisations could discuss competition matters, so that they could grow towards greater convergence of competition law and analysis, as well as a common understanding and a common competition culture. Part of the logic behind this initiative was that countries may be prepared to meaningfully cooperate, but not necessarily in a strict, legally binding manner.²⁴¹² Members were persuaded that there was an urgent need for a forum for the world’s competition agencies to meet and work together addressing common challenges, and that the value of articulating aspirational best practice standards offset concerns about not immediately meeting such standards.²⁴¹³ Support of the EU, a proponent of the WTO-track, followed after the crisis surrounding the GE/Honeywell case.²⁴¹⁴ On October 25, 2001, the leading competition officials of Australia, Canada, the EU, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, the United Kingdom, the US, and Zambia, founded the ICN.²⁴¹⁵ The name change was due to the negative connotation of the word ‘global’ at the time, as it was feared to be a red flag to anti-globalization activists. ‘International’ was a less charged alternative. The word ‘network’ was added to underline the interactive and non-hierarchical nature of the initiative.²⁴¹⁶ Currently, the ICN is comprised of around 120 competition

²⁴¹¹ E. Fox, “Linked-In: Antitrust and the Virtues of a Virtual Network” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsels, Intersentia, 2011, 113; D. Daniel Sokol “The ICN in the Context of International Antitrust Institutions” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsels, Intersentia, 2011, 156.

²⁴¹² E. Fox, “Linked-In: Antitrust and the Virtues of a Virtual Network”, Law & Economics Research Paper Series, Working Paper No. 09-27, July 2009, 158.

²⁴¹³ X., “Interview: Randolph Tritell: A U.S. Government official’s perspective on international antitrust”, *Concurrences*, N° 2-2011, 12.

²⁴¹⁴ D. Daniel Sokol “The ICN in the Context of International Antitrust Institutions” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsels, Intersentia, 2011, 157.

²⁴¹⁵ See <http://www.internationalcompetitionnetwork.org/about/history.aspx> (accessed July 2017); A. Heimler, “EU Foreign policy tools/Competition policy” in F. Bindi (ed.), *The foreign policy of the European Union – Assessing Europe’s role in the world*, 1st ed., Massachusetts, Brookings Institution Press, 2010, 97, footnote 22.

²⁴¹⁶ E. Fox, “Linked-In: Antitrust and the Virtues of a Virtual Network”, Law & Economics Research Paper Series, Working Paper No. 09-27, July 2009, 160.

agencies from over a hundred jurisdictions,²⁴¹⁷ and is generally considered as a success. It has been able to create its own momentum, and appears to continue in a stable and focused manner.²⁴¹⁸

The ICN therefore is a much younger forum than the OECD or UNCTAD, but its membership is more extended. It distinguishes itself from the abovementioned forums in other ways as well. It had to differentiate itself, considering the critics that claimed during its creation that other organisations were already doing useful work or could expand their activities. The ICN engages in work that cannot properly be done by either the OECD, UNCTAD, or the WTO.²⁴¹⁹ A first defining characteristic is that the Network is almost entirely virtual. There is no secretariat, but a Steering Group of members is in control. Most interactions happen via the internet or the phone. The annual conference is one of the only occasions where real-life interactions take place. Second, the ICN focuses on ‘all competition, all of the time’, and has a strong inclination toward the practical.²⁴²⁰ It is the only international body devoted exclusively to competition law enforcement.²⁴²¹ According to the ICN, it “*provides competition authorities with a specialized yet informal venue for maintaining regular contacts and addressing practical competition concerns.*”²⁴²² The dynamic dialogue created in this way can build consensus and convergence.²⁴²³ The original Memorandum on the Establishment and Operation of the ICN laid the pavement for work that is aimed at convergence, experience-sharing, supporting competition advocacy, and seeking to facilitate international cooperation. More specifically, the ICN aims to help its members achieve four main outcomes: to better address private anti-competitive behaviour as well as unwarranted public restrictions on competition, to minimise incompatible outcomes across jurisdictions, and to reduce unnecessary cost and burdens resulting from duplicative or inconsistent procedures. The ICN has in 2011 published the goals that it will pursue during the second decade of its existence. It will continue to encourage the dissemination of competition experience and best practices, formulate proposals for procedural and substantive convergence through a results-oriented agenda and structure, support competition advocacy, while facilitating effective international cooperation. Where convergence is not possible, for instance due to different domestic economic histories, development and priorities, the ICN aims to facilitate ‘informed divergence’, namely identifying the nature of and sources or rationales behind divergences so that they can be better understood and respected. This in turn may lead to greater clarity and transparency and can lay the groundwork for possible longer-term convergence.²⁴²⁴

B) Membership

The ICN also distinguishes itself from other international forums via its membership, which is very inclusive, consists of agencies, not governments, and includes a wide range of other non-governmental actors (NGAs). Participation and transparency are central to the ICN. Every competition authority in the world is welcome. In practice, however, there is differentiation in the level of participation of each authority. A central core of mature agencies is more active than

²⁴¹⁷ ICN, The ICN’s vision for its second decade, Presented at the 10th annual conference of the ICN, The Hague, Netherlands, 17-20 May 2011, 1.

²⁴¹⁸ E. Fox, ‘Linked-In: Antitrust and the Virtues of a Virtual Network’, Law & Economics Research Paper Series, Working Paper No. 09-27, July 2009, 165-166.

²⁴¹⁹ Ibid., 166.

²⁴²⁰ M. Coppola, ‘One network’s effect: the rise and future of the ICN’, *Concurrences*, N° 3-2011, 227.

²⁴²¹ Taking into consideration that the ECN is limited to the European Union and not truly international in scope.

²⁴²² See <http://www.internationalcompetitionnetwork.org/about.aspx> (accessed July 2017).

²⁴²³ Ibid.

²⁴²⁴ ICN, The ICN’s vision for its second decade, Presented at the 10th annual conference of the ICN, The Hague, Netherlands, 17-20 May 2011, 4-6.

younger, less resourced ones (despite some funding by the ICN). A lack of time, and sometimes of expertise, also plays a role, as well as language constraints.²⁴²⁵ Not only participation is influenced in this manner, power dynamics can occur as well. As inclusive and democratic as the ICN wishes to be, “the process of negotiation is nevertheless likely to reflect imbalances in terms of resources, clout, power and influence.”²⁴²⁶ The ICN Steering Group as well is, somewhat logically, dominated by developed countries, as they generally have more experience and resources.²⁴²⁷ The fact that it are competition agencies, and not governments that make up the ICN, allows for less formal and bureaucratic contacts. It also allegedly decreases the risk of politicization, which at least creates the perception that negotiations will be easier and quicker.²⁴²⁸

Far more than in the OECD, where academics are occasionally invited to give their insights on certain issues,²⁴²⁹ the ICN from the start welcomed members of the business, consumer and academic communities, civil society groups, private sector attorneys from in-house and law firm backgrounds, as well as the economic professions. They provide their unique insights when scrutinising ideas and discussing analytical approaches or specific language of various work products. Such insight might point to potential effects of work product that agencies themselves might not readily foresee.²⁴³⁰ NGA input is therefore a valuable resource for the ICN, and helps in broadening its support-base and in increasing its legitimacy in the eyes of stakeholders, by providing a sense of ownership of the various outcomes.²⁴³¹ NGA participation is also beneficial for ICN members with little resources, as NGAs share the resource burden of participating in ICN projects.²⁴³² Criticism has been voiced regarding potential undue influence from NGAs, however, and bias in the ‘openness’ of the Network, in particular from the business community and from large Anglo-Saxon law firms, on the ICN’s agenda.²⁴³³ The decision-making mechanism of the ICN however (see below) offsets any

²⁴²⁵ E. Fox, “Linked-In: Antitrust and the Virtues of a Virtual Network”, Law & Economics Research Paper Series, Working Paper No. 09-27, July 2009, 167.

²⁴²⁶ M.-L. Djelic, “International Competition Network” in T. Hale & D. Held (eds), *Handbook of transnational governance – institutions and innovations*, Cambridge, Polity Press, 2011, 84.

²⁴²⁷ Ibid., 85.

²⁴²⁸ C. Damro, “The new trade politics and EU competition policy: shopping for convergence and co-operation”, *Journal of European Public Policy*, Vol. 13, No. 6, September 2006, 879.

²⁴²⁹ The OECD also receives input from BIAC, the Business and Industry Advisory Committee to the OECD. The Committee is comprised of business representatives, in-house lawyers and former officials of competition authorities having joined the bar. (F. Jenny, “The International Competition Network and the OECD Competition Committee: Differences, Similarities and Complementarities” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 101.)

²⁴³⁰ D. Daniel Sokol “The ICN in the Context of International Antitrust Institutions” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 157.

²⁴³¹ J. Fingleton, “Competition Agencies and Global Markets: The Challenges Ahead” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 195; F. Jenny, “The International Competition Network and the OECD Competition Committee: Differences, Similarities and Complementarities” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 100; D. Daniel Sokol “The ICN in the Context of International Antitrust Institutions” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 157.

²⁴³² ICN, The ICN’s vision for its second decade, Presented at the 10th annual conference of the ICN, The Hague, Netherlands, 17-20 May 2011, 25.

²⁴³³ F. Jenny, “The International Competition Network and the OECD Competition Committee: Differences, Similarities and Complementarities” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Intersentia, Mortsel, 2011, 101.

type of unjustifiable influence.²⁴³⁴ Concerns regarding democratic deficit are nevertheless valid (see below, Part III, 2.3.3).

C) Functioning

According to SOKOL, the success of the ICN is due to its institutional design and its originally rather modest agenda, focusing on issues on which success would be fairly easy to achieve.²⁴³⁵ The ICN is relatively non-hierarchical in nature.²⁴³⁶ It is ‘governed’ by a steering group, consisting of fifteen elected members – who serve renewable two-year terms – and three *ex officio* members. The latter represent ICN members designated to host an annual conference. During the annual conference, in odd-numbered years, Steering Group members are confirmed by consensus of ICN Members.²⁴³⁷ The Steering Group sets the agenda, determines the work plans, and identifies the priorities. This is later approved by ICN members during the annual conference.²⁴³⁸

The work is done in Working Groups, focused on specific aspects of competition policy, who operate on a consensus basis. If consensus is not possible, the different views are identified in the reports.²⁴³⁹ The working groups, comprising a high level of expertise, are flexible and project-oriented. Currently working groups exist on advocacy, agency effectiveness, cartels, mergers, and unilateral conduct, but this may change according to the need. According to WHITE, this ‘compartmentalisation’ “*may allow the ICN to operate more efficiently than an entity with an operating structure with multiple levels of authority.*”²⁴⁴⁰ As mentioned, the ICN is a virtual organisation, without a permanent secretariat, headquarters, or other permanent staff. It is estimated that 90% of the ICN’s work is conducted virtually, meaning by email, the internet, and teleconferencing.²⁴⁴¹ Virtual contacts are then strengthened via face-to-face contacts at the annual conference, and sometimes workshops.²⁴⁴² Much of the ICN’s activity takes place at this conference, not in the least the official adoption of recommendations and other documents.²⁴⁴³ The virtual nature of the network facilitates participation and allows for speed and adaptability to address issues where a pressing demand exists for international action and for which practical solutions can be envisaged.²⁴⁴⁴

²⁴³⁴ M.-L. Djelic, “International Competition Network” in T. Hale & D. Held (eds), *Handbook of transnational governance – institutions and innovations*, Cambridge, Polity Press, 2011, 82.

²⁴³⁵ D. Daniel Sokol “The ICN in the Context of International Antitrust Institutions” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsels, Intersentia, 2011, 157.

²⁴³⁶ P.-H. Verdier, “Regulatory networks and their limits”, Harvard John M. Olin Center for Law, Economics, and Business Fellow’s Discussion Paper Series, Discussion Paper No. 22, 9/2008, 47.

²⁴³⁷ See <http://www.internationalcompetitionnetwork.org/about/steering-group.aspx> (accessed July 2017).

²⁴³⁸ M.-L. Djelic, “International Competition Network” in T. Hale & D. Held (eds), *Handbook of transnational governance – institutions and innovations*, Cambridge, Polity Press, 2011, 81.

²⁴³⁹ ICN Operational Framework, Adopted by ICN members, 13 February 2012.

²⁴⁴⁰ P. White, “International judicial assistance in antitrust enforcement: the shortcomings of current practices and legislation, and the roles of international organizations”, *Administrative Law Review*, Vol. 62, No. 1, 2010, 276.

²⁴⁴¹ C. Damro, “The new trade politics and EU competition policy: shopping for convergence and co-operation”, *Journal of European Public Policy*, Vol. 13, No. 6, September 2006, 879.

²⁴⁴² M. Coppola, “One network’s effect: the rise and future of the ICN”, *Concurrences*, N° 3-2011, 223.

²⁴⁴³ P.-H. Verdier, “Regulatory networks and their limits”, Harvard John M. Olin Center for Law, Economics, and Business Fellow’s Discussion Paper Series, Discussion Paper No. 22, 9/2008, 47.

²⁴⁴⁴ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 189-190. For examples, see the ICN Work Products Catalog, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc1109.pdf> (accessed July 2017).

As mentioned, one of the ICN's goals is to reach convergence. HOLLMAN and KOVACIC have identified three stages of convergence based on statements of agency officials intensely involved in the ICN's early development and subsequent operations. In the first stage of decentralized experimentation, nations test substantive rules, analytical methods, procedures, and administrative techniques. Based on this experience, superior practices are identified, to which countries can then voluntarily opt-in. Satisfaction with a standard may eventually lead to its inclusion in a treaty or other form of international obligation. The ICN contributes to this process by first increasing the understanding of individual systems, by engaging its members in regular discussions about existing practice that may illuminate similarities and explain differences. This fuller understanding forms the basis for the identification of superior practices. At this stage inclusive participation is crucial, both by agencies from well-established market economies as well as economies in transition. As mentioned, resource issues may present a dilemma here. On the one hand, most resources (including human resources) will reside in older, more experienced agencies. Without their resource commitment the ICN would collapse. On the other hand, however, contributions often go hand in hand with a certain control, which may raise doubts among less experienced and resourced jurisdictions that the network truly serves their interests.²⁴⁴⁵ It has been remarked that many of the ICN-compliant jurisdictions share relatively more experience as well as a large GDP. This has led to concerns that the recommended practices are a disguised means for the leading competition authorities to export their regulatory regimes. Such concerns regarding regulatory export by larger agencies, while not entirely unfounded, can be mitigated however by the consensus-based functioning of the network.²⁴⁴⁶ Moreover, the larger authorities also simply have more experience experimenting with several aspects of competition policy, so it makes sense that they have a large input in the recommendations. According to COPPOLA experience suggests that dissenting voices have considerable power.²⁴⁴⁷ The next stage is the monitoring and assessing of the actual opt-in by members (see below). The informality that is characteristic of the ICN allows regulators to reduce the uncertainty paired with cooperation, as it allows experimentation with different approaches permitting the assessment of the economic impact without fully engaging.²⁴⁴⁸ Finally, interoperability across systems should be promoted where characteristics remain dissimilar and convergence cannot be achieved.²⁴⁴⁹ The ICN is also active in this field.

2.1.4.2 Accomplishments/work product

The ICN is not a formal rule-maker, but does create soft law in its attempts to create convergence (which again may create concerns regarding accountability and democratic deficit, see below, Part III, 2.3.3). It does not constrain or coerce its members to adhere to the practices it promotes. This is also reflected in its consensus-oriented decision-making, rather than working with a majority rule.²⁴⁵⁰

²⁴⁴⁵ H. M. Hollman & W. E. Kovacic, "The International Competition Network: Its Past, Current and Future Role" in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 57-59.

²⁴⁴⁶ A. Piilola, "Assessing theories of global governance: a case study of international antitrust regulation", *Stanford Journal of International Law*, Vol. 39, 2003, 221.

²⁴⁴⁷ M. Coppola, "One network's effect: the rise and future of the ICN", *Concurrences*, N° 3-2011, 225, 227.

²⁴⁴⁸ P.-H. Verdier, "Regulatory networks and their limits", Harvard John M. Olin Center for Law, Economics, and Business Fellow's Discussion Paper Series, Discussion Paper No. 22, 9/2008, 51.

²⁴⁴⁹ H. M. Hollman & W. E. Kovacic, "The International Competition Network: Its Past, Current and Future Role" in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 57-59.

²⁴⁵⁰ M.-L. Djelic, "International Competition Network" in T. Hale & D. Held (eds), *Handbook of transnational governance – institutions and innovations*, Cambridge, Polity Press, 2011, 84.

When consensus is reached on certain ‘recommendations’ or ‘best practices’, the members can decide whether and how they will implement them.

Focus on international enforcement cooperation has been present from the beginning, but received renewed momentum in June 2011, when “*the ICN Steering Group decided to consider a potential project for the ICN in its Second Decade to assess member agencies’ needs with respect to international enforcement cooperation and identify appropriate work to be carried out by the ICN to address those needs.*”²⁴⁵¹ In March earlier that year, the US FTC and DoJ had already co-organized an ICN Roundtable to deepen the discussion on enforcement cooperation within the network. It was the first ICN program to specifically address international enforcement cooperation across competition enforcement areas.²⁴⁵² As an outcome of its Second Decade Project, the ICN in April 2012 approved a Steering Group project on international enforcement cooperation.²⁴⁵³ Momentum was increased as the OECD Competition Committee as well had identified international enforcement cooperation as one of its ‘strategic themes’ for 2012-2014. Both organizations were in contact when scoping their respective projects and designed the aforementioned Joint Survey, which was of unprecedented comprehensiveness.²⁴⁵⁴ The questions relating to the ICN were designed to acquire ICN members’ views on the usefulness of existing ICN cooperation-related work, and on their needs and priorities for future ICN cooperation-related work.²⁴⁵⁵

Members have a strong influence on what output is created. Again, the ICN aims to address the practical needs of the agencies. Feedback offered by members during workshops for instance has led to the inclusion the following year of sessions specifically tailored to younger agencies – one on using Forensic IT during inspections and another on what makes leniency policy successful.²⁴⁵⁶ Also during Roundtables the floor is open for discussion of future ICN work. In this manner for instance it became clear that promoting international cooperation on enforcement matters was considered an ICN priority by many members. Examples of suggested future work included the creation of a living contact list of cooperation liaisons, use of the ICN blog to provide cooperation tips and experiences, webinars or teleseminars on case cooperation examples and techniques by substantive working groups, advocacy efforts on the value of cooperation, etcetera.²⁴⁵⁷

As becomes clear, the output produced by the ICN is very diverse. The ICN issued a statement of achievements covering its first decade, listing the accomplishments per active working group, other active projects, and former working groups.²⁴⁵⁸ Early projects mainly focused on merger review and advocacy, but now the ICN tackles issues from virtually all areas of competition law and policy.²⁴⁵⁹ VERDIER identifies a gradual shift from focus on procedural matters to more substantive issues.²⁴⁶⁰ The ICN’s work includes recommended or best practices, case-handling and enforcement manuals

²⁴⁵¹ ICN Steering Group International Enforcement Cooperation Project, March 2012, 1.

²⁴⁵² ICN Roundtable on Enforcement Cooperation, Roundtable Report & Questionnaire Response Summary, Washington, DC, 29 March 2011, 1.

²⁴⁵³ ICN, ICN Report on OECD/ICN questionnaire on international enforcement cooperation, 2012, 2.

²⁴⁵⁴ ICN Steering Group International Enforcement Cooperation Project, March 2012, 2- 3.

²⁴⁵⁵ ICN, ICN Report on OECD/ICN questionnaire on international enforcement cooperation, 2012, 3.

²⁴⁵⁶ A. Italianer, “Zero Tolerance for International Cartels”, Speech at the ICN Cartel Workshop, Bruges, 2011, 9.

²⁴⁵⁷ ICN Roundtable on Enforcement Cooperation, Roundtable Report & Questionnaire Response Summary, Washington, DC, 29 March 2011, 11.

²⁴⁵⁸ ICN Statement of Achievements 2001-2011.

²⁴⁵⁹ M. Coppola, “One network’s effect: the rise and future of the ICN”, *Concurrences*, N° 3-2011, 222.

²⁴⁶⁰ P.-H. Verdier, “Regulatory networks and their limits”, Harvard John M. Olin Center for Law, Economics, and Business Fellow’s Discussion Paper Series, Discussion Paper No. 22, 9/2008, 47-48.

(such as the Anti-Cartel Enforcement Manual, which holds a pragmatic reference for agencies to evaluate and benchmark their own approaches²⁴⁶¹), reports, templates on legislation and rules in different jurisdictions (for instance the model leniency waiver template), databases and toolkits (for instance for advocacy), workshops, reports, teleseminars and webinars, discussions at annual conferences, and so on.²⁴⁶² While the virtual work cannot be underestimated, the personal bonds that are created during the workshops and the annual conference, that knows a very high attendance rate, were labelled as a key benefit of the Network.²⁴⁶³

One particular project to be mentioned is the ICN Curriculum Project launched in 2010, which is an open-source virtual university for competition authority officials.²⁴⁶⁴ It relies on existing ICN work product for guidance, and offers training modules in the form of video lectures and accompanying materials from a diverse group of both academics and practitioners. Participation is free of charge.²⁴⁶⁵

The instruments ranked as most highly useful in the Joint Survey were the ICN Recommended Practices for Merger Notification and Review Procedures, Recommended Practice X on Interagency Coordination, and the ICN Merger Working Group Model Confidentiality Waiver.²⁴⁶⁶ The ICN's best practices are more specific and practical than the ones issued by the OECD, which are addressed to governments rather than agencies. The ICN is better placed to issue best practices that do not require competition authorities to change their legislation, while the OECD Competition Committee is, at least from an institutional perspective, better placed to address issues which require legislative changes or coordination between government policies.²⁴⁶⁷ The ICN best practices are often adopted by ICN members even if many of their own laws and practices are not conform. This willingness and the legitimacy often enjoyed by the practices due to close public-private cooperation in drafting, add to the potential of some best practices in becoming an important global baseline.²⁴⁶⁸

2.1.4.3 Implementation

Many ICN members indicated that the process of creating the work product is extremely valuable on its own. Working closely together leads to exchange, understanding, and learning.²⁴⁶⁹ The relationships forged during this process are highly valued, and may lead to increased case-cooperation, which as such is not one of the focus points of the ICN.²⁴⁷⁰ However, while the ICN is generally applauded for the consensus it manages to achieve, the actual implementation and use of

²⁴⁶¹ A. Italianer, "Zero Tolerance for International Cartels", Speech at the ICN Cartel Workshop, Bruges, 2011, 9.

²⁴⁶² European Parliament, Directorate-General for Internal Policies, Policy Department A – Economic and Scientific Policy, Competition Policy in International Agreements – Study for Econ Committee, IP/A/ECON/2015-02, August 2015, 29.

²⁴⁶³ ICN, The ICN's vision for its second decade, Presented at the 10th annual conference of the ICN, The Hague, Netherlands, 17-20 May 2011, 1; M. Coppola, "One network's effect: the rise and future of the ICN", *Concurrences*, N° 3-2011, 223.

²⁴⁶⁴ ICN, The ICN's vision for its second decade, Presented at the 10th annual conference of the ICN, The Hague, Netherlands, 17-20 May 2011, 7.

²⁴⁶⁵ M. Coppola, "One network's effect: the rise and future of the ICN", *Concurrences*, N° 3-2011, 228.

²⁴⁶⁶ ICN, ICN Report on OECD/ICN questionnaire on international enforcement cooperation, 2012, 3.

²⁴⁶⁷ F. Jenny, "The International Competition Network and the OECD Competition Committee: Differences, Similarities and Complementarities" in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsels, Intersentia, 2011, 102.

²⁴⁶⁸ M. Coppola, "One network's effect: the rise and future of the ICN", *Concurrences*, N° 3-2011, 224.

²⁴⁶⁹ Ibid., 227.

²⁴⁷⁰ B. Sweeney, "International Competition Law and Policy: A Work in Progress", *Melbourne Journal of International Law*, Vol. 10, 2009, 67.

the practices and other documents adopted by the members – in other words, policy influence – is an important factor of success as well.²⁴⁷¹ It is questioned in this manner whether the ICN goes beyond being a mere ‘talking shop’. According to COPPOLA allegations of the ICN being a ‘talking shop’ are entirely refutable based on statistics about convergence and anecdotes about influence.²⁴⁷²

Despite there being several factors to measure the success of the ICN besides implementation, the ICN is increasingly focusing on stimulating the implementation of its work product.²⁴⁷³ The ICN has indeed been accused of not being very good in disseminating or ‘retailing’ its output, and ‘getting it off the shelf’.²⁴⁷⁴ This may be explained in part by the lack of permanent staff or a secretariat, and therefore the absence of specific marketing and outreach specialists. The ICN could also try to collaborate with regional networks and centres, and get more of its output, apart from the recommendations, translated.²⁴⁷⁵ Relying on voluntary cooperation also means that it is somewhat difficult to ‘be tough’ and tell members that they are not doing a good job.²⁴⁷⁶ To this day, even founding members of the ICN still fail to adhere to certain aspects of Recommended Practices.²⁴⁷⁷

In this context, the work of the Advocacy and Implementation Network (AIN) is of great value. This network within the ICN is responsible for developing and, with the approval of the Steering Group, implementing a work plan to promote and advocate for the (better) use of ICN work products by competition authorities globally, including via the facilitation of technical assistance. It does so via the Advocacy & Implementation Network Support Program, established in 2008. Both representatives from the Working Groups as well as volunteer members are engaged in the AIN. Through the support program, ICN members can either seek advice about specific ICN work products or ask for assistance on the practical implementation of ICN recommendations or other guidance documents.²⁴⁷⁸ The agency requesting assistance together with the AIN prepares a plan for assistance, identifying relevant ICN work product and supporting agencies. This assistance is generally provided in a virtual manner. Financial assistance is excluded.²⁴⁷⁹ Among other things, AIN also developed an ICN Work Product Catalogue, listing and describing all ICN work products from 2002 to 2014.²⁴⁸⁰ It also monitors competition law and policy developments in member agencies and promotes ICN work product to international organisations and external bodies. ICN members

²⁴⁷¹ M. Coppola & C. Lagdameo, “Taking Stock and Taking Root: A Closer Look at Implementation of the ICN Recommended Practices for Merger Notification & Review Procedures” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 299; E. Fox, “Linked-In: Antitrust and the Virtues of a Virtual Network”, Law & Economics Research Paper Series, Working Paper No. 09-27, July 2009, 167.

²⁴⁷² M. Coppola, “One network’s effect: the rise and future of the ICN”, *Concurrences*, N° 3-2011, 223, 227.

²⁴⁷³ F. Jenny, “The International Competition Network and the OECD Competition Committee: Differences, Similarities and Complementarities” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 102; ICN, The ICN’s vision for its second decade, Presented at the 10th annual conference of the ICN, The Hague, Netherlands, 17-20 May 2011, 8.

²⁴⁷⁴ “Crossing Merger Control Frontiers: What are the new borders?”, 3rd Annual conference organized by Concurrences and Paul Hastings, Paris, 30 October 2015.

²⁴⁷⁵ M. Coppola, “One network’s effect: the rise and future of the ICN”, *Concurrences*, N° 3-2011, 228.

²⁴⁷⁶ “Crossing Merger Control Frontiers: What are the new borders?”, 3rd Annual conference organized by Concurrences and Paul Hastings, Paris, 30 October 2015.

²⁴⁷⁷ R. Stern, “An in-house perspective on global competition law developments”, *Concurrences*, N°2-2012, 2.

²⁴⁷⁸ ICN, The ICN’s vision for its second decade, Presented at the 10th annual conference of the ICN, The Hague, Netherlands, 17-20 May 2011, 9.

²⁴⁷⁹ See <http://www.internationalcompetitionnetwork.org/about/steering-group/advocacy-implementation/aisup.aspx> (accessed July 2017).

²⁴⁸⁰ See <http://www.internationalcompetitionnetwork.org/about/steering-group/advocacy-implementation.aspx> (accessed July 2017).

reported that ICN support of their advocacy activities is of the main benefits of participating in the network.²⁴⁸¹

It is difficult to establish the causal relationship between certain reforms and ICN work product. Significant reforms have taken place in the areas in which Recommended Practices are in place. The factors leading to these reforms can however be diverse and multifaceted. A study conducted in 2005 by the ICN for instance revealed that the principal factors driving merger reform are “1) a desire to bring the merger review regime into greater conformity with international best practice, including the Recommended Practices; 2) convergence toward the regimes of other jurisdictions, such as those with well-established merger review systems, a regional leader, or a close trading partner; and 3) recognition by stakeholders, in particular, the private bar, the business community, and the competition agency, that the merger review system was not as effective or efficient as it could be.”²⁴⁸² Members face significant barriers to implement the practices, despite the willingness of most members to do so, such as legal obstacles, insufficient resources, uncertainty regarding the impact on resources, lack of stakeholder support, or the complexity of some of the Practices.²⁴⁸³ Moreover, not all aspects of the Practices may be appropriate for every jurisdiction. As resource-issues form one of the main obstacles for implementation, members who have made reforms should maintain data on the costs and benefits of the reform and of the potential savings as a result of the reform. So far members have generally not done so or have not made such data public.²⁴⁸⁴

The most well-known ICN instruments, the recommendations, are generally used as guidance when drafting and revising national laws, as drivers of reform, offering additional legitimacy (see the table below with regard to the merger recommendations for instance).²⁴⁸⁵

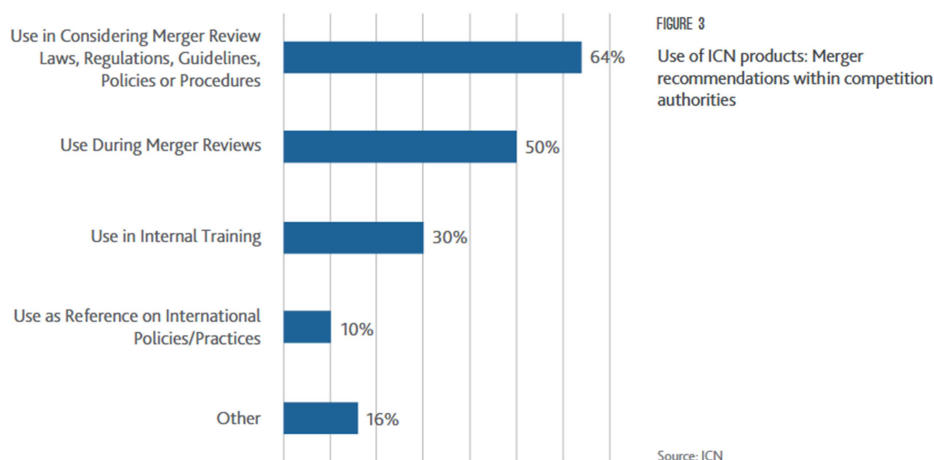


Figure 14. E. Pérez Motta, “Competition policy and the trade system: challenges and opportunities”, E15 Expert Group on Competition Policy and the Trade System Overview Paper, April 2016, available at <http://e15initiative.org/wp-content/uploads/2015/09/E15-Competition-Motta-Final.pdf> (accessed May 2017), 5.

²⁴⁸¹ ICN, The ICN’s vision for its second decade, Presented at the 10th annual conference of the ICN, The Hague, Netherlands, 17-20 May 2011, 9.

²⁴⁸² M. Coppola, “One network’s effect: the rise and future of the ICN”, *Concurrences*, N° 3-2011, 226.

²⁴⁸³ M. Coppola & C. Lagdameo, “Taking Stock and Taking Root: A Closer Look at Implementation of the ICN Recommended Practices for Merger Notification & Review Procedures” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsels, Intersentia, 2011, 312.

²⁴⁸⁴ M. Coppola, “ICN Best Practice: Soft Law, Concrete Results”, *CPI Antitrust Chronicle*, July 2011, 4, footnote 12, 5.

²⁴⁸⁵ *Ibid.*, 3.

They have also informed an OECD recommendation on merger notifications.²⁴⁸⁶ Since its establishment, over one hundred recommended practices have been issued to member agencies on a wide variety of topics. Most often, both competition agencies as well as the private sector use them as a benchmark to evaluate the appropriateness of laws and policies.²⁴⁸⁷ This causes some pressure to conform, “as agencies appear to view their reputational value as linked to conformity with the Recommended Practices.”²⁴⁸⁸ Some concrete numbers can be given with regard to the Recommendations on Merger Notifications and Review Procedures. A 2010 survey of ICN members revealed that over 75% of the 54 responding agencies used or were using the Practices to identify areas for change, provide conforming language, and build support for change, while almost 80% intended to use the Practices in the near future. About 60% of the respondents claimed that the Recommended Practices had already caused changes in their merger review regimes. At the time, 22 of the ICN’s then 87 members that had a merger control regime, were entirely conform with the Recommended Practices.²⁴⁸⁹

Examples are the adoption of the Korean merger notification thresholds in 2003 and again in 2007-2009 when they were reformed, during which South-Korea publicly indicated its desire to bring its legislation into line with the Recommended Practices for Merger Notification and Review Procedures,²⁴⁹⁰ or the situation in India in 2007 with regard to its new merger regime that was at odds with one of the most important recommended practices for mergers. India saw itself forced to bring the regime into greater conformity with the latter, after complaints from the Indian and foreign private sector, often using the ICN recommendations as a benchmark for their complaints. Equally, bar associations and business groups used the Recommended Practices to highlight areas of the merger regime of the Slovak Republic deserving reform.²⁴⁹¹ Also in Belgium, Brazil, Bulgaria, Ireland, and Portugal, for instance, the Recommended Practices have been used by competition agencies to advocate for legislative reforms, mostly to the merger regimes.²⁴⁹² Also with regard to leniency programmes, a number of competition agencies have cited the relevant ICN materials as instrumental in the development or revision of such programmes.²⁴⁹³ ICN work product equally plays a role in the adoption of new regimes, such as the introduction of merger control in China, where bodies commenting on various proposals frequently cited the ICN.²⁴⁹⁴ In short, it most certainly seems unfair to claim that the ICN is yet another expression of the “*tendency of governments to commit to harmonization and unification projects that produce little hard law but provide officials with high-profile venues to display themselves*”, while distracting from desirable changes and rather inducing cosmetic changes to appeal to the international audience.²⁴⁹⁵

²⁴⁸⁶ E. Fox, “Linked-In: Antitrust and the Virtues of a Virtual Network”, Law & Economics Research Paper Series Working Paper No. 09-27, July 2009, 169.

²⁴⁸⁷ M. Coppola, “One network’s effect: the rise and future of the ICN”, *Concurrences*, N° 3-2011, 3; M. Coppola, “One network’s effect: the rise and future of the ICN”, *Concurrences*, N° 3-2011, 226.

²⁴⁸⁸ M. Coppola, “ICN Best Practice: Soft Law, Concrete Results”, *CPI Antitrust Chronicle*, July 2011, 4.

²⁴⁸⁹ M. Coppola, “One network’s effect: the rise and future of the ICN”, *Concurrences*, N° 3-2011, 224.

²⁴⁹⁰ R. Stern, “An in-house perspective on global competition law developments”, *Concurrences*, N°2-2012, 2.

²⁴⁹¹ M. Coppola, “One network’s effect: the rise and future of the ICN”, *Concurrences*, N° 3-2011, 226.

²⁴⁹² R. Stern, “An in-house perspective on global competition law developments”, *Concurrences*, N°2-2012, 2.

²⁴⁹³ J. Fingleton, “An international perspective”, *Concurrences*, N° 3-2010, 4.

²⁴⁹⁴ A. Heimler, “EU Foreign policy tools/Competition policy” in F. Bindi (ed.), *The foreign policy of the European Union – Assessing Europe’s role in the world*, 1st ed., Massachusetts, Brookings Institution Press, 2010, 92.

²⁴⁹⁵ P. Stephan, “Global Governance, Antitrust, and the Limits of Cooperation”, *Cornell International Law Journal*, Vol. 38, 2005, pp. 173-218, 202-203.

2.1.4.4 Future: challenges ahead

A) Broadening

The ICN has quickly established itself as one of the most relevant forums in international antitrust. However, some have expressed doubts on whether the ICN can continue to exist as it currently does. There is some discussion as to whether the ICN should stick to ‘all antitrust, all the time’, or expand its work to more broad issues. TRITELL, for instance, claims that while the mantra has “*served the organization well in focusing its activities during its early years on issues that most directly concern its member agencies [...] there are external challenges to competition policy that can emanate from other parts of government, and the ICN is considering whether it can play a useful and effective role as an advocate for competition policy in these broader settings.*”²⁴⁹⁶ MARSDEN, however, rightly claims that expanding the ICN’s focus risks to distract the ICN from practical and achievable projects, and would moreover result in duplication of existing work. At the same time the Network would be restricted by the fact that it is not an intergovernmental institution.²⁴⁹⁷ The ICN should therefore remain focused on competition law enforcement issues, while transpolicy-issues could be addressed by intergovernmental forums crossing several policy areas such as the OECD.

B) Deepening

The ICN should, and is, exploring more controversial issues, while building on the existing work, of which the implementation is being encouraged. During one of the ICN’s surveys a respondent mentioned a ‘two-speed ICN’, whereby a focus on practical work is supplemented by discussions of more complex substantive issues.²⁴⁹⁸ As the ICN, and its members, have evolved, it may increase its ambitions and expect more from its members. According to FOX, the ICN already in 2009 needed “*continued leadership and new momentum*”, of which according to her, some could be supplied “*by mining the depths of controversial issues that it [had] thus far chosen to avoid.*”²⁴⁹⁹ Almost ten years later the ICN indeed has pushed the boundaries of its work somewhat, and it should continue to do so. To anticipate potential issues that may arise when more complex questions are addressed by the ICN, it should continue to self-assess its apparent successes and shortcomings, by for instance closely following what happens after the ICN annual conferences upon return of the attending officials, and monitoring the functioning of the working groups and the usefulness of the issues tackled.²⁵⁰⁰ It was suggested as well to integrate the different ICN instruments into fewer documents to provide a more clear and consistent basis for cooperation, following revision of such instruments based on actual experiences with them.²⁵⁰¹

²⁴⁹⁶ X., “Interview: Randolph Tritell: A U.S. Government official’s perspective on international antitrust”, *Concurrences*, N° 2-2011, 12.

²⁴⁹⁷ P. Marsden, “Acta Non Verba: Keep ‘Talking Shop’, Don’t Become Another ‘Talking Shop’” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsels, Intersentia, 2011, 138.

²⁴⁹⁸ ICN, The ICN’s vision for its second decade, Presented at the 10th annual conference of the ICN, The Hague, Netherlands, 17-20 May 2011, 16.

²⁴⁹⁹ E. Fox, “Linked-In: Antitrust and the Virtues of a Virtual Network”, Law & Economics Research Paper Series, Working Paper No. 09-27, July 2009, 152.

²⁵⁰⁰ Ibid., 173.

²⁵⁰¹ ICN, ICN Report on OECD/ICN questionnaire on international enforcement cooperation, 2012, 8.

Some more tangible suggestions regarding future work, coming from ICN members themselves, concern the development of an electronic information-sharing platform,²⁵⁰² added work on transparency, for instance by publishing information about statutory confidentiality protections on the website of the competition agencies or on the ICN's website,²⁵⁰³ or the development of a common terminology. Another suggestion was that the ICN should engage with the judiciary.²⁵⁰⁴

C) Virtual viability

While the virtual nature of the ICN certainly has its benefits, it also brings about problems. In the words of HOLLMAN and KOVACIC “[t]he ICN network may be virtual, but the problems of financing and management that it faces are unmistakably real.”²⁵⁰⁵ If the ICN's role should expand, it can be questioned whether this model will continue to be viable. There may arise a need in the future to examine and refine the ICN's operational framework, in order for its structure and operational forms to remain adequate to support its future programs.²⁵⁰⁶ In the end the ICN is nothing more than the sum of its members. The virtual roots of the ICN must prove to be stable enough. If the driving force of the more advanced jurisdictions comes to a halt, the ICN has little chance of survival. It requires continuous devoted leadership and engagement. This is may become more difficult when more controversial issues arise.²⁵⁰⁷ While the institution is already fairly transparent, further efforts should be made, including on accountability. While the ICN produces soft law, their effect is not to be underestimated, which renders concerns on accountability a valid issue.²⁵⁰⁸

D) Participation

Another recurring challenge mentioned when addressing the future of the ICN is how to achieve heightened involvement of younger or smaller agencies in small or developing economies,²⁵⁰⁹ as well as “ensuring broad private sector participation especially in jurisdictions with less antitrust experience.”²⁵¹⁰ While the consensus-method involves give-and-take on all sides, agenda-setting and norm-creation is still strongly influenced by the desires of developed countries,²⁵¹¹ even if other younger and smaller

²⁵⁰² OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 319.

²⁵⁰³ ICN Roundtable on Enforcement Cooperation, Roundtable Report & Questionnaire Response Summary, Washington, DC, 29 March 2011, 9.

²⁵⁰⁴ ICN, The ICN's vision for its second decade, Presented at the 10th annual conference of the ICN, The Hague, Netherlands, 17-20 May 2011, 17.

²⁵⁰⁵ H. M. Hollman & W. E. Kovacic, “The International Competition Network: Its Past, Current and Future Role” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 91.

²⁵⁰⁶ Ibid.

²⁵⁰⁷ E. Fox, “Linked-In: Antitrust and the Virtues of a Virtual Network”, Law & Economics Research Paper Series Working Paper No. 09-27, July 2009, 173.

²⁵⁰⁸ ICN, The ICN's vision for its second decade, Presented at the 10th annual conference of the ICN, The Hague, Netherlands, 17-20 May 2011, 13; M. Coppola, “One network's effect: the rise and future of the ICN”, *Concurrences*, N° 3-2011, 227.

²⁵⁰⁹ A. Italianer, “Zero Tolerance for International Cartels”, Speech at the ICN Cartel Workshop, Bruges, 2011, 10; ICN, The ICN's vision for its second decade, Presented at the 10th annual conference of the ICN, The Hague, Netherlands, 17-20 May 2011, 13.

²⁵¹⁰ X., “Interview: Randolph Tritell: A U.S. Government official's perspective on international antitrust”, *Concurrences*, N° 2-2011, 13.

²⁵¹¹ E. Fox, “Linked-In: Antitrust and the Virtues of a Virtual Network”, Law & Economics Research Paper Series Working Paper No. 09-27, July 2009, 152.

agencies have stated that the ICN's agenda is well balanced and useful, and reflects their needs.²⁵¹² The more influential ICN work product becomes, the more important it will be to include the needs and context of developing countries and small economies.²⁵¹³ FINGLETON stated in 2010 already that ensuring that *all* member agencies are engaged in the work of the ICN was a central theme of strategic review occurring at that time.²⁵¹⁴ This also implies that resource-issues will become more prominent, even more after the financial and economic crisis, which has urged to 'do more with less'. The cost and timing of international calls or the coordination of international conferences so that they can occur back-to-back are only some of the practical issues that should be (increasingly) addressed, for instance via toll-free numbers or the availability of recordings or minutes of teleseminars and calls, or the webcasting of workshops.²⁵¹⁵

2.1.5 ECN: the ultimate success-story?

While this section focuses on global forums, the European Competition Network, although regional in nature, nevertheless deserves to be mentioned. The respondents to the OECD/ICN Joint Survey identified membership of all involved agencies in a case to a regional network as a factor facilitating both confidential and non-confidential information exchange.²⁵¹⁶ The European Competition Network is widely regarded as one of the most advanced and successful competition networks. It is therefore relevant to analyse more closely the cooperation mechanisms used in the Network and to inquire whether these mechanisms can and should be transposed to a more global level.

2.1.5.1 Origins, institutional structure, and functioning

A) Origins

The entry into force on 1 May 2004 of Regulation 1/2003 on the implementation of the EU competition rules laid down in what are currently Articles 101 and 102 TFEU marked the start of a revolution in EU competition law enforcement.²⁵¹⁷ Prior to the modernisation brought on by Regulation 1/2003, EU competition law enforcement took place in a centralised manner, with full responsibility lying in the hands of the European Commission. Competition law in this manner occupied a special place in the whole of EU law enforcement, and was shielded for more than four decades from multi-level governance. This was even more the case as the epistemic community that formed around EU competition law stayed in relative isolation from other policy fields and the debate on EU governance in general due to its particularly technical language.²⁵¹⁸

²⁵¹² ICN, The ICN's vision for its second decade, Presented at the 10th annual conference of the ICN, The Hague, Netherlands, 17-20 May 2011, 19.

²⁵¹³ E. Fox, "Linked-In: Antitrust and the Virtues of a Virtual Network", Law & Economics Research Paper Series Working Paper No. 09-27, July 2009, 174.

²⁵¹⁴ J. Fingleton, "An international perspective", *Concurrences*, N° 3-2010, 5.

²⁵¹⁵ ICN, The ICN's vision for its second decade, Presented at the 10th annual conference of the ICN, The Hague, Netherlands, 17-20 May 2011, 2, 19-20.

²⁵¹⁶ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 91.

²⁵¹⁷ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ L* 1, 4.1.2003.

²⁵¹⁸ F. Cengiz, "Multi-level governance in competition policy: The European Competition Network", *European Law Review*, Vol. 35, No. 5, 2010, 662, 676-677.

The Regulation set up a system of decentralised enforcement, whereby the competition authorities of the Member States (National Competition Authorities - NCAs) gained increased responsibility in the implementation of Articles 101 and 102 TFEU. In this framework, the 'European Competition Network' was set up as the forum in which the NCAs and Commission could discuss and cooperate in view of ensuring the effective and consistent application and enforcement of the EU competition rules,²⁵¹⁹ as well as an efficient division of work.²⁵²⁰ The ECN does not have legal personality, and consists of the competition agencies of the EU Member States and the European Commission. Due to the fact that the competition rules constituted an essential part of the European economic constitution, consistency in their enforcement was not to be compromised even in the era of decentralisation.²⁵²¹ The objectives of the ECN therefore relate to uniformity, via case allocation and cooperation in investigations and policy making. Regulation 1/2003 did not attempt to govern the division of territorial jurisdiction among the Member States. The jurisdiction of national competition authorities remains within the competence of the Member States within the boundaries of international law. The Regulation contains only one 'hard rule' on jurisdiction, Article 11(6), according to which the Commission can take on a case even if an NCA was already dealing with it.²⁵²²

Article 11(1) of Regulation 1/2003 is the legal basis for administrative cooperation in the ECN. The ECN's functioning was further developed in a Commission notice (the so-called Network Notice) as well as a joint statement of the Council and the Commission, which serves as a common political understanding of the Network.²⁵²³ Similar to the global environment, enforcement of competition law is thereby entrusted to a panoply of proactive enforcers, namely the European Commission, the NCAs and the national and EU courts.²⁵²⁴

The ECN is generally labelled as a success. In the 2009 Report on the first five years of Regulation 1/2003, the ECN was labelled "*an innovative model of governance for the implementation of Community law by the Commission and Member State authorities.*"²⁵²⁵ Five years later, the Commission stated that "*the ECN has developed into a multi-faceted forum for exchanges of experience on the application of substantive competition law as*

²⁵¹⁹ Joint statement of the Council and the Commission on the functioning of the network of competition authorities, paragraph 2 & 5; Commission Notice on cooperation within the Network of Competition Authorities, *OJ C* 101, 27.04.2004, recital 1.

²⁵²⁰ Commission Notice on cooperation within the Network of Competition Authorities, *OJ C* 101, 27.04.2004, recital 3, 43.

²⁵²¹ F. Cengiz, "Multi-level governance in competition policy: The European Competition Network", *European Law Review*, Vol. 35, No. 5, 2010, 661.

²⁵²² A. Mundt, "Ten Years of ECN – Cooperation at its best" in D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae Civis – Liber Amicorum Jaques Steenbergen*, Gent, Larcier, 2014, 503, 504, footnote 5, 505.

²⁵²³ Commission Notice on cooperation within the Network of Competition Authorities, *OJ C* 101, 27.04.2004; Joint Statement of the Council and the Commission on the functioning of the network of Competition Authorities, paragraph 3. Also see I. Breit, J. Capiu, D. Dalheimer, V. Juknevičiūtė, P. Krenz, E. Rijkers, A. Sinclair, "Developments in and around the European Competition Network and cooperation in competition enforcement in the EU: an update", *Concurrences*, N° 3-2012, 81.

²⁵²⁴ K. Dekeyser & E. De Smijter, "The exchange of evidence within the ECN and how it contributes to the European co-operation and co-ordination in cartel cases", *Legal Issues of Economic Integration*, Vol. 32, No. 2, 2005, 161.

²⁵²⁵ Communication from the Commission to the European Parliament and the Council - Report on the functioning of Regulation 1/2003, COM/2009/0206 final, SEC(2009)574, recital 47.

well as on convergence of procedures and sanctions.”²⁵²⁶ It further underlined the dynamic development that took place within the ECN, resulting in the establishment of the NCAs as a key pillar of the application of the EU competition rules. However, the Commission also highlighted some areas where improvement is welcomed, in particular with regard to procedural convergence.²⁵²⁷ Regulation 1/2003 does not contain harmonisation measures with regard to national procedural rules relevant to competition authorities. Already in the wake of the 2009 Report, the ECN had initiated a process seeking possibilities for voluntary convergence of national procedural frameworks.²⁵²⁸

B) Institutional structure

When not dealing with discussions and assistance regarding individual cases, but functioning as a forum for the discussion of general policy issues, the Network operates via horizontal working groups and sector-specific subgroups. Horizontal working groups address general questions of antitrust enforcement in conduct cases and meet on a regular basis to discuss topical policy developments and to pursue common policy projects. The sectorial subgroups deal with antitrust enforcement in particular sectors and meet on an ad hoc basis when important developments in a particular sector arise. In these subgroups case-handlers of the different agencies exchange views and learn from each other’s experiences. Again the promotion of the coherent application of EU antitrust rules is central.²⁵²⁹ The rather informal working groups undertake technical work and are created organically around topics as they arise. Both types of subgroups report to the ECN Plenary, which is a formal arena for the heads of NCAs to meet. It takes position on the reports from the working groups, decides whether to create new sub-groups and divides the work among the groups, and discusses practical aspects of the ECN’s operation.²⁵³⁰ Interagency contacts therefore occur on different levels.²⁵³¹

The ECN does not portray many of the typical characteristics of network governance, with regard to origins, functions, structure, and operation.²⁵³² First of all the membership of the ECN is much more homogeneous and there is more trust and less variability than in a traditional global network. EU members are geographically close and share a common history, and similar political and economic ideologies. They can moreover benefit from an overarching, treaty-based framework spelling out long-term political and economic commitments.²⁵³³ The ECN is characterised by a strong legal structure, namely a cooperation mechanism predetermined in hard law as well as soft law, as well as

²⁵²⁶ European Commission, Communication from the Commission to the European Parliament and the Council, “Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives”, COM(2014) 453, SWD(2014) 230}_{SWD(2014) 231, 9 July 2014, 4.

²⁵²⁷ Ibid., 11.

²⁵²⁸ A. Mundt, “State of play of decentralized application of European competition law: collection and exchange of information within the ECN”, *Concurrences*, N°4-2014, 2.

²⁵²⁹ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 60.

²⁵³⁰ H. Kassim & K. Wright, “Network governance and the European Union: the case of the European Competition Network”, paper for ARENA Workshop ‘The transformation of the executive branch of government in Europe’, University of Oslo, 4-6 June 2009, 10-11.

²⁵³¹ I. Breit, J. Capiu, D. Dalheimer, V. Juknevičiūtė, P. Krenz, E. Rikkers, A. Sinclair, “Developments in and around the European Competition Network and cooperation in competition enforcement in the EU: an update”, *Concurrences*, N° 3-2012, 83.

²⁵³² On network governance, see below Part III, 2.3. H. Kassim & K. Wright, “Network governance and the European Union: the case of the European Competition Network”, paper for ARENA Workshop ‘The transformation of the executive branch of government in Europe’, University of Oslo, 4-6 June 2009, 2.

²⁵³³ A.-M. Slaughter, *A new world order*, Princeton, Princeton University Press, 2004, 134-135.

the special ‘managerial’ position of the Commission. Networks often arise organically, voluntarily, and experimentally among equals, from the need for cooperation to achieve a common goal.²⁵³⁴ The ECN was designed top-down around the European Commission and in function of EU competition law enforcement. Other networks generally do not have such a strong network design. The ECN also lacks a strong dispute resolution mechanism, a feature generally present in multi-level governance networks.²⁵³⁵ The ECN indeed has a clearly defined purpose and ascribes clear responsibilities to its members.²⁵³⁶ These differences can be explained by the historic importance given to competition policy in the EU and the fact that it was exclusively entrusted to the Commission. Indeed, contrary to other networks, the ECN did not emerge in an effort to coordinate multiple authorities in the absence of centralized authority. On the contrary, the competence of the Commission was long-established and the ECN was created to govern the decentralized enforcement that would come to the forefront.²⁵³⁷

Table: Summary of predictions regarding the functioning of ECN

General Characteristics of Networks	ECN	Predicted Outcome
voluntary formation	central planning	rigid network, unresponsive policy enforcement
design through experimentation	pre-determined formal cooperation mechanisms	
harmony in membership	disharmony in membership	network of varied speed
equal positions of members	hierarchical	distrust between members
dispute resolution	no strong mechanism	case allocation disputes

Figure 15. Source: F. Cengiz, “Multi-level governance in competition policy: The European Competition Network”, *European Law Review*, Vol. 35, No. 5, 2010, 666.

Originally it was therefore thought that the ECN was too strong in terms of its structure and too weak in terms of its membership to be successful (see table above).²⁵³⁸

C) Functioning – information exchange

The ‘close cooperation’ to which the Commission and the NCAs committed themselves is based on two pillars: an informal case allocation regime and extensive information exchange mechanisms.²⁵³⁹

²⁵³⁴ F. Cengiz, “Multi-level governance in competition policy: The European Competition Network”, *European Law Review*, Vol. 35, No. 5, 2010, 662, footnote 11, 663. Based on D. Coen and M. Thatcher, “Network Governance and Multi-level Delegation: European Networks of Regulatory Agencies”, *Journal of Public Policy*, Vol. 28, No. 49, 2008, comprising a comparison of multi-level policy networks operating in other policy fields. See F. Cengiz, “Management of Networks between the Competition Authorities in the EC and the US: Different Politics, Different Designs”, *European Competition Journal*, Vol. 3, No. 2, 2007, 429.

²⁵³⁵ F. Cengiz, “Multi-level governance in competition policy: The European Competition Network”, *European Law Review*, Vol. 35, No. 5, 2010, 663, 666.

²⁵³⁶ H. Kassim & K. Wright, “Network governance and the European Union: the case of the European Competition Network”, paper for ARENA Workshop ‘The transformation of the executive branch of government in Europe’, University of Oslo, 4-6 June 2009, 4.

²⁵³⁷ H. Kassim & K. Wright, “Network governance and the European Union: the case of the European Competition Network”, paper for ARENA Workshop ‘The transformation of the executive branch of government in Europe’, University of Oslo, 4-6 June 2009, 4.

²⁵³⁸ F. Cengiz, “Multi-level governance in competition policy: The European Competition Network”, *European Law Review*, Vol. 35, No. 5, 2010, 666.

²⁵³⁹ Ibid.

The Regulation deals with both horizontal cooperation among the NCAs and vertical cooperation between the NCAs and the Commission. The focus in this section will mainly be on the former, as this is more relevant in the context of agency cooperation.²⁵⁴⁰

Central to the functioning of the ECN in this context are Articles 12 and 22 of Regulation 1/2003. Article 12 relates to the exchange of information between the Network members. It allows them to provide one another with and use as intelligence or as evidence any matter of fact or of law, including confidential information, without the consent of the parties. Cooperation may occur at the pre-investigatory, investigatory and post-investigatory phases. Information exchanges pursuant to Article 12 may take place in the context of inspections, where it may enable authorities to obtain a more complete picture of a suspected infringement. These exchanges generally take place at a very early stage of an investigation,²⁵⁴¹ in the pre-investigation phase. Before evidence-gathering begins, information exchanged generally regards markets to be investigated or companies to be targeted. During the investigation phase, evidence may also be gathered and analysed to build up the case and agencies may coordinate investigatory measures. At the post-investigation phase, finally, agencies usually exchange evidence and other information obtained during earlier stages of the proceedings and engage in general discussions of the case to reach efficient and consistent prosecution, adjudication and sanctioning.²⁵⁴² None of the cooperation forms that apply among NCAs are obligatory, however. The only obligations under Regulation 1/2003 exist in the relationship between the NCAs and the Commission. Article 12 merely provides the *opportunity* to exchange information.

Information can be exchanged regardless of the (criminal or administrative) nature of the underlying proceedings. If information is exchanged not as intelligence, but as evidence, its use, however, is conditional. Use of exchanged information is restricted in several ways. It must be for the purpose of enforcing article 101 or 102 TFEU and must be used in respect of the subject-matter for which it was collected by the transmitting authority. Information may be exchanged for the application of national competition law in the event that national competition law is applied in the same case and in parallel to EU competition law and does not lead to a different outcome. If used as evidence, the information exchanged may not lead to the imposition of sanctions on natural persons unless the law of the transmitting authority foresees similar sanctions or if the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. In the latter case custodial sanctions

²⁵⁴⁰ In short, vertical cooperation entails that the NCAs inform the Commission about first formal investigative measures, the adoption of infringement or commitment decisions under Article 7(1) and Article 9(1) respectively, and decisions withdrawing the benefit of a block exemption regulation under Article 29(2). This allows the European Commission to intervene if there is a serious risk of inconsistency in the application of EU competition law. NCAs are moreover entitled to consult the Commission, and they have to provide it with the documents needed for the assessment of a case. The Commission is under the obligation to transmit copies of both ‘most important’ and ‘other existing’ documents to NCAs and to inform them about its own first investigative measures (Article 11(2)-(6) Regulation 1/2003). NCAs must inform each other of all cases that they investigate under EU competition law (OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 59-60).

²⁵⁴¹ Commission Staff Working Paper SEC(2009)574 accompanying the Communication from the Commission to the European Parliament and Council Report on the functioning of Regulation 1/2003 COM(2009)206 final, 29 April 2009, 71.

²⁵⁴² M. Błachucki & S. Józwiak, “Exchange of Information and Evidence between Competition Authorities and Entrepreneurs’ Rights”, *Yearbook of Antitrust and Regulatory Studies*, Vol. 5, No. 6, 2012, 154-155.

remain excluded.²⁵⁴³ This provision (see below, Part III, 4.5.1.2, B), assumes a sufficient degree of equivalence in procedural rights in the different jurisdictions of the Network.

Leniency information as well as other information that has been obtained during or following an inspection or any other fact-finding measures which, in each case, could not have been carried out except as a result of the leniency application can be exchanged without consent of the applicant in a limited number of circumstances. This is the case when the receiving authority has also received a leniency application relating to the same infringement from the same applicant as the transmitting authority (provided that at the time the information is transmitted it is not open to the applicant to withdraw the information which it has submitted to that receiving authority), when the receiving authority has provided a written commitment that none of the information will be used by it or by any other authority to which the information is subsequently transmitted to impose sanctions on the leniency applicant or on any other legal or natural person covered by the favourable treatment offered by the transmitting authority as a result of the application made by the applicant under its leniency programme, or on any employee or former employee of any of these persons.²⁵⁴⁴ According to DEKEYSER and DE SMIJTER, these far-reaching safeguards (complemented by those mentioned below) may prevent extensive information exchange and therefore lead to structural under-punishment as not only the leniency applicant, but also other participants to the competition rules infringing behaviour will escape from effective sanctioning.²⁵⁴⁵ The use of information gathered in the framework of a leniency procedure is subject to certain further restrictions. Leniency related information submitted pursuant to Article 11 of Regulation 1/2003, dealing with Cooperation between the Commission and the competition authorities of the Member States, cannot be used by other network members to start an investigation.²⁵⁴⁶

As mentioned, confidential information can be exchanged as well. National guarantees have been replaced with an EU-wide guarantee of protection contained in Article 28(2) of Regulation 1/2003, stating that the ECN members may not disclose information acquired or exchanged by them in the framework provided by the Regulation of the kind covered by the obligation of professional secrecy. This concept has an EU-specific meaning and encompasses business secrets and other confidential information (see above, Part II, 3.4.2).²⁵⁴⁷ There is no obligation to inform the undertakings concerned about any exchange of information.

Article 22 offers the opportunity for Member States to initiate inspections or other fact-finding measures on behalf and for the account of another national competition authority or the European Commission. It is the national law of the member state where the enforcement action takes place that is valid.²⁵⁴⁸ Whether or not such assistance is offered is left entirely to the discretion of the requested authority. While information exchange takes place regularly, this type of assistance is also

²⁵⁴³ Commission Notice on cooperation within the Network of Competition Authorities, *OJ C* 101, 27.04.2004, recital 28(c).

²⁵⁴⁴ *Ibid.*, recital 41-42.

²⁵⁴⁵ K. Dekeyser & E. De Smijter, "The exchange of evidence within the ECN and how it contributes to the European co-operation and co-ordination in cartel cases", *Legal Issues of Economic Integration*, Vol. 32, No. 2, 2005, 166.

²⁵⁴⁶ Commission Notice on cooperation within the Network of Competition Authorities, *OJ C* 101, 27.04.2004, recital 39.

²⁵⁴⁷ The protection only applies when information is objectively confidential, the will of an undertaking to keep information confidential is therefore irrelevant. Opinion of Advocate General Lenz in *AKZO Chemie BV and AKZO Chemie UK Ltd v Commission of the European Communities*, 53/85, EU:C:1986:25.

²⁵⁴⁸ OECD, Global Forum on Competition, Improving international co-operation in cartel investigations, Contribution from the European Union, DAF/COMP/GF/WD(2012)53, 9 February 2012, 4.

offered on a regular basis.²⁵⁴⁹ Often when information is exchanged and used as evidence, it is in the context of an Article 22 scenario. It should be noted, however, that national competition authorities did encounter some difficulties when using the documents collected by another national competition authority due to different legislation on the confidentiality requirements.²⁵⁵⁰

Information exchanges within the ECN take place via an allegedly secure, fast, and user-friendly intranet.²⁵⁵¹ How NCAs should engage with each other is not regulated in detail. No particular procedures for the practical operation of the exchange of information are laid down in Regulation 1/2003, or in any other EU act. Cooperation therefore generally takes place via certain practical *modi operandi* that have emerged within the Network.²⁵⁵² For instance, the information obligation to report new cases where EU law is applied,²⁵⁵³ is fulfilled by uploading a standard form on the common case-management system (see below). The competition authorities inform each other of cases via a standard form containing basic information regarding the case. This includes the authority dealing with the case, the product, markets, and parties concerned, the alleged infringement, the suspected duration of the infringement and the origin of the case.²⁵⁵⁴ Information regarding all stages of investigations can be shared through a securely encrypted on-line database, which can be tracked by all network members.²⁵⁵⁵ The database is divided in two levels, 'ECN Circa', to which each case handler has an own account, and 'ECN Interactive', of a higher confidentiality level, where notifications of opened proceedings are lodged.²⁵⁵⁶ Other cooperation mechanisms have been created to allow that the relevant authorities can be informed before an inspection is carried out, to allow for coordination, for instance in the form of simultaneous searches, raids or inspections.²⁵⁵⁷ It is argued that this type of openness compensates the absence of hard jurisdictional rules and concrete dispute resolution mechanisms in the network.²⁵⁵⁸ Apart from these formal means of cooperation foreseen in the legislation surrounding the Network, the ECN also hosts a range of informal cooperation

²⁵⁴⁹ The Italian competition authority, for instance, inspected the premises of a lead producer and seller of fruit and vegetable packaging located in Italy on behalf and for the account of the Spanish competition authority. This resulted in fines by the Spanish competition authority for an anticompetitive agreement among fruit packaging producers in Spain. The Austrian competition authority assisted the German competition authority by carrying out an inspection in the sector of the production of fire fighting vehicles and super-structural parts. I. Breit, J. Capiu, D. Dalheimer, V. Juknevičiūtė, P. Krenz, E. Rijkers, A. Sinclair, "Developments in and around the European Competition Network and cooperation in competition enforcement in the EU: an update", *Concurrences*, N° 3-2012, 82.

²⁵⁵⁰ Commission Staff Working Paper SEC(2009)574 accompanying the Communication from the Commission to the European Parliament and Council Report on the functioning of Regulation 1/2003 COM(2009)206 final, 29 April 2009, 71.

²⁵⁵¹ A. Mundt, "State of play of decentralized application of European competition law: collection and exchange of information within the ECN", *Concurrences*, N°4-2014, 2.

²⁵⁵² M. Blachucki & S. Józwiak, "Exchange of Information and Evidence between Competition Authorities and Entrepreneurs' Rights", *Yearbook of Antitrust and Regulatory Studies*, Vol. 5, No. 6, 2012, 154-155

²⁵⁵³ Article 11(3) Regulation 1/2003.

²⁵⁵⁴ Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.04.2004, Article 17. Also see OECD, Inventory of co-operation agreements, Note by the secretariat, DAF/COMP/WP3(2015)12/REV1, 20 November 2015, 35.

²⁵⁵⁵ F. Cengiz, "Multi-level governance in competition policy: The European Competition Network", *European Law Review*, Vol. 35, No. 5, 2010, 668.

²⁵⁵⁶ H. Kassim & K. Wright, "Network governance and the European Union: the case of the European Competition Network", paper for ARENA Workshop "The transformation of the executive branch of government in Europe", University of Oslo, 4-6 June 2009, 7.

²⁵⁵⁷ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 20.

²⁵⁵⁸ F. Cengiz, "Multi-level governance in competition policy: The European Competition Network", *European Law Review*, Vol. 35, No. 5, 2010, 668.

mechanisms. One example are so-called informal requests for information (RFI's), often concerning public information such as information related to the legislation in force, case law, or economic data.²⁵⁵⁹

D) Functioning – case-allocation

The second pillar of the ECN is the case-allocation mechanism. The Network is based on a system of parallel competences to apply the EU competition rules, aimed at an efficient division of work providing coherent results. Each network member retains full discretion in deciding whether or not to investigate a case. Cases can then be dealt with by either a single NCA, possibly with assistance, several NCAs, or the Commission. Re-allocation of a case generally takes place at the outset of a procedure, due to the fact that either the authority originally burdened with the case considers itself not suited to act, or when other authorities consider themselves well placed to act. The Network Notice offers some guidance with regard to when an authority can consider itself to be well placed to deal with a case. The alleged anticompetitive behaviour under investigation must have substantial direct actual or foreseeable effects on competition within the territory of the authority, or must be implemented within or originates from that territory. The authority must moreover be able to effectively bring the entire infringement to an end and appropriately sanction the infringement. Finally, the authority must be able to gather the evidence required to prove the infringement, if necessary with the assistance of other authorities. A material link is therefore required between the infringement and the territory of a Member State. Even when more than one NCA can be regarded as well placed, the action of a single NCA is preferred when it is sufficient to bring the entire infringement to an end.²⁵⁶⁰ Cases may be re-allocated if efficient enforcement so requires. The Commission is well-placed to act where the infringement affects more than three Member States or where there is a link to other priority actions of the Union, but it is never obliged to act.²⁵⁶¹ If the Commission formally initiates proceedings, national agencies lose their competence to deal with the same case. This system of work allocation is believed to avoid the hindrance of effective enforcement of the EU antitrust rules due to a lack of resources of a particular agency and allows EU control over cases involving important issues for the development of EU competition policy.²⁵⁶²

The Network Notice merely states that re-allocation should be a quick and efficient process and that it should not hold up on-going investigations. No strict time limit has been set out, but it is mentioned that normally after a period of two months following notification of a case in the Network, re-allocation should only occur in case of a material change of facts.²⁵⁶³ Companies do not have the right to have a case dealt with by a particular authority. As mentioned, a competition authority intending to investigate and sanction an infringement must inform the Network by inserting some basic information in the ECN database. This allows for rapid detection of multiple

²⁵⁵⁹ M. Blachucki & S. Józwiak, “Exchange of Information and Evidence between Competition Authorities and Entrepreneurs’ Rights”, *Yearbook of Antitrust and Regulatory Studies*, Vol. 5, No. 6, 2012, 159, footnote 72.

²⁵⁶⁰ Commission Notice on cooperation within the Network of Competition Authorities, *OJ C* 101, 27.04.2004, recital 5-11.

²⁵⁶¹ Commission Staff Working Paper SEC(2009)574 accompanying the Communication from the Commission to the European Parliament and Council Report on the functioning of Regulation 1/2003 COM(2009)206 final, 29 April 2009, 63.

²⁵⁶² OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 60.

²⁵⁶³ Commission Notice on cooperation within the Network of Competition Authorities, *OJ C* 101, 27.04.2004, recital 7, 18-19.

proceedings and aids efficient work-sharing, as other authorities may signal their interest to also act in the case.²⁵⁶⁴

E) Example

Some examples can be provided on cooperation between competition authorities within the ECN, even if systematic data are not available. The Netherlands Authority for Consumers and Markets (ACM) reports joint investigations involving the planning and executing of joint dawn raids, information exchange according to Articles 12 and 22 of Regulation 1/2003, using offices and staff of another authority for detection and to interview individuals, as well as joint discussions on issues such as the definition of the relevant markets or jurisdictional issues to avoid double jeopardy.²⁵⁶⁵ Before the entry into force of Regulation 1/2003 and therefore the case-allocation mechanism, the ACM mentions cooperation in the *Shrimp Cartel* case,²⁵⁶⁶ which marked the first time that the ACM established a violation of European competition rules alongside a violation of Dutch competition rules. The ACM fined 8 shrimp wholesalers and a number of Dutch, German and Danish trade organisations. When doing this, it only looked at the anticompetitive behaviour's effects on the Dutch market, because the German Bundeskartellamt was simultaneously investigating illegal activities in the same sector and in this way the latter would not be faced with a possible *ne bis in idem* situation.²⁵⁶⁷ This case is referred to as an example of ECN cooperation '*avant la lettre*', as the latter did not exist yet at the time.²⁵⁶⁸

Another remarkable cooperation case is the *Flour Mill Cartel* case.²⁵⁶⁹ In this case the ACM coordinated inspections by several NCAs carrying out parallel investigations into similar cartels in their respective territories, after having received leniency applications from applicants from various countries.²⁵⁷⁰ Documents were transmitted according to Article 12 of Regulation 1/2003, and case teams visited each other to be present at interviews conducted on their behalf. Coordination continued further in the case as well.²⁵⁷¹ When a German flour mill claimed inability to pay, the Bundeskartellamt and the ACM coordinated their fining. After a joint assessment, the ACM lowered its fine and the Bundeskartellamt proceeded with the imposition of a fine taking into account the

²⁵⁶⁴ Commission Staff Working Paper SEC(2009)574 accompanying the Communication from the Commission to the European Parliament and Council Report on the functioning of Regulation 1/2003 COM(2009)206 final, 29 April 2009, 63.

²⁵⁶⁵ C. Fonteijn & S. O'Keeffe, "Information Exchange Between Authorities: Enhancing Enforcement", 21st St.-Gallen International Competition Law Forum, 15-16 May 2014, 6.

²⁵⁶⁶ Case n. 2269/Garnalen, NMA decision of 14 January 2003, available at <http://www.acm.nl/nl/publicaties/publicaties/884/Garnalen---boete/> (accessed July 2017).

²⁵⁶⁷ C. Fonteijn & S. O'Keeffe, "Information Exchange Between Authorities: Enhancing Enforcement", 21st St.-Gallen International Competition Law Forum, 15-16 May 2014, 7-8.

²⁵⁶⁸ P. Amador Sanchez, G. Bakker, A. Kleijweg, "The art of enforcement: Cooperation with other institutions, a national competition authority's perspective" in H. Don, J. de Keijzer, E. Lamboo, M. van Oers, J. van Sinderen (eds), *The Art of Supervision, Liber Amicorum, Pieter Kalbfleisch*, Rotterdam, Editor Ronald Kouwenhoven, 2011, 42-43.

²⁵⁶⁹ Summary of Case 6306 of the Dutch Authority for Consumers and Markets, "Fine cartels flour producers", 22 December 2010, available at <https://www.acm.nl/en/publications/publication/3975/Fine-cartels-flourproducers/> (accessed July 2017), X., "NMa imposes fines totaling more than EUR 80 million for cartel agreements in flour industry", 22 December 2010, Authority for Consumers and Markets, available at <https://www.acm.nl/en/publications/publication/5827/NMa-imposes-fines-totaling-more-than-EUR-80-million-for-cartel-agreements-in-flour-industry/> (accessed July 2017).

²⁵⁷⁰ More precisely the Belgian and German competition authorities.

²⁵⁷¹ C. Fonteijn & S. O'Keeffe, "Information Exchange Between Authorities: Enhancing Enforcement", 21st St.-Gallen International Competition Law Forum, 15-16 May 2014, 9.

ability to pay of the undertaking. The undertaking in turn announced that it would not appeal the fine by the Bundeskartellamt and it withdrew its appeal against the Dutch fine.²⁵⁷² The *Flour Mill* case was said to be “*exemplary of [...] ECN cooperation in cartel cases*” at the time.²⁵⁷³

F) ECN output

As mentioned, the ECN is generally seen as a success, with a significant track record in cooperation activities and the resulting enforcement actions. The ECN has also produced some more tangible output, in the form of soft harmonization tools. Competition agencies cooperate to develop a common approach by way of upstream convergence.²⁵⁷⁴ The ECN regularly issues Recommendations on different policy topics. Examples include the ECN Recommendation on Investigative Powers, Enforcement Measures and Sanctions in the context of Inspections and Requests for Information, which sets out the minimum investigative powers that an ECN authority must have at its disposal in order to function effectively, the ECN Recommendation on the Power to Collect Digital Evidence, including by Forensic Means, or the ECN Recommendation on Commitment Procedures and the ECN Recommendation on the Power to Impose Structural Remedies. It has also produced reports that provide an overview of the different systems and procedures for antitrust investigations within the ECN, for instance on investigative powers or decision-making. The ECN moreover creates resolutions on topics such as the reform of the common agricultural policy, as well as sector reports.²⁵⁷⁵ An area of soft harmonisation in which the ECN has been particularly active is leniency. The ECN developed a common set of rules on how to apply leniency policy in the ECN, resulting inter alia in an EU-wide Model Leniency Programme.²⁵⁷⁶ The ECN has finally developed a joint communication tool available to the public, in the form of the ‘ECN Brief’. The publication compiles topical contributions from NCAs and DG COMP.²⁵⁷⁷

4.5.1.2 Unique characteristics

Due to the success of the ECN many turn to the Network for inspiration regarding international cooperation. The Network, however, is characterised by some unique features that render it difficult to generalise the cooperation mechanisms that exist within it.

A) Common basis of substantive law

²⁵⁷² X., “The German Competition Authority coordinates with the Dutch NCA its fining against a German mill involved in a cartel in the flour industry (Mühlen), The Netherlands and Germany: Joint Solution to cross-border Inability to Pay Claim in Flour Cartel Cases”, *European Competition Network Brief*, e-Competitions/N° 51205, 1-2; C. Fonteijn & S. O’Keeffe, “Information Exchange Between Authorities: Enhancing Enforcement”, 21st St.-Gallen International Competition Law Forum, 15-16 May 2014, 9.

²⁵⁷³ P. Amador Sanchez, G. Bakker, A. Kleijweg, “The art of enforcement: Cooperation with other institutions, a national competition authority’s perspective” in H. Don, J. de Keijzer, E. Lamboo, M. van Oers, J. van Sinderen (eds), *The Art of Supervision, Liber Amicorum, Pieter Kalbfleisch*, Rotterdam, Editor Ronald Kouwenhoven, 2011, 43.

²⁵⁷⁴ I. Breit, J. Capiou, D. Dalheimer, V. Juknevičiūtė, P. Krenz, E. Rikkers, A. Sinclair, “Developments in and around the European Competition Network and cooperation in competition enforcement in the EU: an update”, *Concurrences*, N° 3-2012, 83.

²⁵⁷⁵ A list of recommendations can be found at <http://ec.europa.eu/competition/ecn/documents.html> (accessed July 2017).

²⁵⁷⁶ ECN Model Leniency Programme, 2012, available at http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf (accessed July 2017).

²⁵⁷⁷ See <https://webgate.ec.europa.eu/multisite/ecn-brief/en/brief/editorial> (accessed July 2017) and <http://ec.europa.eu/competition/ecn/brief/archive.html> (accessed July 2017).

One important feature of the ECN is that its members in part apply the same substantive (EU) competition laws, in parallel with their own national laws.²⁵⁷⁸ The national competition authorities operate in an environment characterised by the supremacy and direct effect of EU law as well as national non-harmonised procedures.²⁵⁷⁹ Indeed, the Network was designed not only to ensure an efficient division of work and handling of cases within the Network, but mostly to ensure an effective and uniform application of a shared set of substantive rules, namely the EU competition rules.²⁵⁸⁰

This implies that there are no large substantive discrepancies among the different jurisdictions working together. Regulation 1/2003 did not impose any form of procedural harmonisation. While this was not an important issue during the early years of the Network, it does seem to cause some difficulties today, as cooperation intensifies (see Part III, 4.5.1.3, A). The fact that this hurdle did not have to be overcome in the field of substantive laws, however, makes a great difference compared to the international environment as the identification and analysis of anticompetitive behaviour will generally be aligned. The fact that all Member States belong to an economically and politically deeply integrated area therefore has certain consequences.²⁵⁸¹

B) Assumption of equivalence

Linked to the above, a second difference between cooperation in the Network and cooperation internationally, is that in the ECN there is a so-called ‘assumption of sufficient equivalence’ regarding the protection of the rights of defence enjoyed by undertakings in the various legal systems of the member states, despite the absence of procedural harmonization. Indeed, the institutional shape of national competition authorities, remedies, damages and litigation, data protection, definition of confidential information, enforcement powers and procedures of investigation, etcetera, all remain a national prerogative.²⁵⁸² Nevertheless, Member States are obliged to recognise each other’s enforcement systems as a basis for cooperation. This is possible because Member States, and therefore also their NCAs, have to comply with EU law. This includes the principles of effectiveness and equivalence as well as the requirements revolving around due process arising from fundamental rights. These requirements have an impact on the set-up and functioning of national enforcement frameworks.²⁵⁸³ The Member States also have the duty to ensure the *effet utile* of the Treaty’s competition rules. They should be able to adequately bring to end and sanction an infringement, and

²⁵⁷⁸ Member States can, however, have national competition laws which could lead to stricter outcomes than the position under EU law.

²⁵⁷⁹ P. Holmes, A. Papadopoulos, B. Özgür Kayalı & A. Sydorak, “A Taxonomy of International Competition Cooperation Provisions”, paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 65-66.

²⁵⁸⁰ M. Blachucki & S. Józwiak, “Exchange of Information and Evidence between Competition Authorities and Entrepreneurs’ Rights”, *Yearbook of Antitrust and Regulatory Studies*, Vol. 5, No. 6, 2012, 153-154.

²⁵⁸¹ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 68.

²⁵⁸² P. Holmes, A. Papadopoulos, B. Özgür Kayalı & A. Sydorak, “A Taxonomy of International Competition Cooperation Provisions”, paper for the International Research and Policy Symposium on Competition Policy for International Development, Growth and Trade organized by Centre for Economic Policy Research, Brussels, 9-10 December 2005, 65.

²⁵⁸³ I. Breit, J. Capiu, D. Dalheimer, V. Juknevičiūtė, P. Krenz, E. Rikkers, A. Sinclair, “Developments in and around the European Competition Network and cooperation in competition enforcement in the EU: an update”, *Concurrences*, N° 3-2012, 79.

in general NCAs are obliged to comply with the mechanisms of the Regulation.²⁵⁸⁴ An effectiveness requirement for the procedural framework of a Member States therefore seems to be in place, setting a de facto minimum harmonization level for national procedures.²⁵⁸⁵ This makes it easier for the members of the ECN to trust one another when cooperating on a certain case, as they are subject to the same minimum requirements. Without this automatic mutual recognition, information exchange would be significantly hampered, first because the standard in the receiving jurisdiction would have to be assessed before exchange, and second because “*this exercise of comparative law would give rise to perpetual challenges by the undertakings involved.*”²⁵⁸⁶ It must be remarked, however, that a minimum harmonization does not create a level playing field, and difficulties remain (see below, Part III, 4.5.1.3, A).²⁵⁸⁷

The assumption of equivalence is somewhat formalized in paragraph 8 of the Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities, which contains the principle of ‘mutual recognition of national procedural rules’.²⁵⁸⁸ It states that while it is accepted that the enforcement systems of the Member States differ, they must nonetheless recognize each other’s standards as a basis for cooperation. This is of course made easier by the fact that a large majority of ECN Member States adheres to the same administrative model.²⁵⁸⁹

C) Top-down steering

According to FINGLETON, “*the reasons for the success of the EU network are inextricably linked to the vertical aspects of its nature.*”²⁵⁹⁰ He first pointed to the role of the legal supremacy of the EU in addressing substantive conflicts. Another factor that separates the ECN from the global antitrust environment is the European Commission acting as *primus inter pares*. The discussions preceding the adoption of Regulation 1/2003 mainly revolved around the vertical relationship between the Commission and the national competition authorities. Important to notice as well is that contrary to cooperation in the international sphere, where merger control constitutes one of the more successful areas of international cooperation, this has not been the case in the ECN. An explanation for this is that national merger control regimes were already in place before the emergence of an EU-wide system. The situation was reversed with regard to the fight against cartels.²⁵⁹¹ When no existing regime is in place, convergence was much easier. According to the OECD “[t]he compulsory nature of EU regulations

²⁵⁸⁴ Article 35 Regulation 1/2003.

²⁵⁸⁵ A. Mundt, “Ten Years of ECN – Cooperation at its best” in D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae Civis – Liber Amicorum Jaques Steenbergen*, Gent, Larcier, 2014, 511.

²⁵⁸⁶ K. Dekeyser & E. De Smijter, “The exchange of evidence within the ECN and how it contributes to the European co-operation and co-ordination in cartel cases”, *Legal Issues of Economic Integration*, Vol. 32, No. 2, 2005, 170-171.

²⁵⁸⁷ A. Mundt, “Ten Years of ECN – Cooperation at its best” in D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae Civis – Liber Amicorum Jaques Steenbergen*, Gent, Larcier, 2014, 511-512.

²⁵⁸⁸ “*Member States accept that their enforcement systems differ but nonetheless mutually recognize the standards of each other’s system as a basis for cooperation.*”

²⁵⁸⁹ B. Lasserre, “Le réseau européen de concurrence: entre réussites et défis” dans D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae Civis – Liber Amicorum Jaques Steenbergen*, Gent, Larcier, 2014, 476; and I. Breit, J. Capiat, D. Dalheimer, V. Juknevičiūtė, P. Krenz, E. Rikkers, A. Sinclair, “Developments in and around the European Competition Network and cooperation in competition enforcement in the EU: an update”, *Concurrences*, N° 3-2012, 79.

²⁵⁹⁰ J. Fingleton, “Competition Agencies and Global Markets: The Challenges Ahead” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 194.

²⁵⁹¹ B. Lasserre, “Le réseau européen de concurrence: entre réussites et défis” dans D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae Civis – Liber Amicorum Jaques Steenbergen*, Gent, Larcier, 2014, 476-477.

is the main feature that distinguishes this regional network from general international co-operation.”²⁵⁹² The introduction of the Significant Impediment to Effective Competition test via Regulation 139/2004 for instance created the top-down incentive for NCAs to abandon the criterion of dominant position.²⁵⁹³

It has been claimed that rather than a force of decentralization, the ECN functions as a centralising mechanism in its search for convergence in enforcement. Much power is put in the hands of the Commission: cases involving three or more Member States are said to be best handled by the Commission, as well as cases that raise new issues, making the Commission the main policy-deviser. The Commission may also review the envisaged decisions of NCAs and may try to either correct the approach informally or withdraw the case, generating a certain amount of pressure on an NCA to comply with the Commission’s visions. This ‘threat’ is a powerful mechanism by which the Commission can ‘push’ Member States towards a desired approach.²⁵⁹⁴ It is reported that informal discussions have led to NCAs changing their decision.²⁵⁹⁵ The EU courts as well are able to clarify and steer any opacities, for instance on the relationship between the leniency application made to the Commission and a summary application made to an NCA (paragraphs 24 to 26 of the Model Leniency Notice) and linked to this the legal status of the ECN Model Leniency Notice.²⁵⁹⁶ The CJEU has also played a role in limiting the powers of NCAs. In *Tele 2* it established that only the Commission can declare that a practice does not infringe competition law, and not the NCAs.²⁵⁹⁷ This is confirmation of the role of the Commission as ‘first among equals’. This type of steering is impossible in today’s global arena. MONTI advocated to loosen the reins of centralised control. He pointed out that the prevailing ECN ethos of convergence and coherence, and the accompanying policing-mechanisms of the CJEU and the Commission make it less easy for NCAs to experiment and evolve.²⁵⁹⁸

4.5.1.3 Not just a success story

Despite the reputation that the ECN has acquired, its story is not just one of successes. Several years of experience have exposed the weaknesses of the Network. The public hearing organised by the ECON Committee in the European Parliament on ‘Empowering the national competition authorities to be more effective enforcers of the EU competition rules’ on 19 April 2016 demonstrated that much work still can and needs to be done.

A) Assumption of equivalence but no real equivalence: a common procedural framework is lacking

²⁵⁹² OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 68.

²⁵⁹³ B. Lasserre, “Le réseau européen de concurrence: entre réussites et défis” dans D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae Civis – Liber Amicorum Jaques Steenbergen*, Gent, Larcier, 2014, 479.

²⁵⁹⁴ J. Fingleton, “Competition Agencies and Global Markets: The Challenges Ahead” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 194.

²⁵⁹⁵ G. Monti, “Independence, interdependence and legitimacy: the EU Commission, National Competition Authorities, and the European Competition Network”, EUI Working Papers, LAW 2014/01, 2, 16.

²⁵⁹⁶ M. Favart, “ECJ Advocate General Wathelet hands down opinion on the relationship between the EU Commission and NCA leniency applications for the same Cartel (DHL)”, *e-Competitions National Competition Law’s Bulletin*, N°75916.

²⁵⁹⁷ Judgment of 3 May 2011, *Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska sp. z o.o., devenue Netia SA*, Case C-375/09, EU:C:2011:270.

²⁵⁹⁸ G. Monti, “Independence, interdependence and legitimacy: the EU Commission, National Competition Authorities, and the European Competition Network”, EUI Working Papers, LAW 2014/01, 16, 19.

It was mentioned before that there is an assumption of equivalence regarding the procedural rules of the member states. According to MUNDT, the provisions relating to procedural aspects of national legislation in Regulation 1/2003²⁵⁹⁹ represent no more than a “*punctual harmonization of isolated procedural issues, representing the absolute minimum of procedural harmonization that was put in place in order to get the ECN going*”.²⁶⁰⁰ The Regulation attempted to attenuate some of the differences, for instance by prohibiting the use of information and evidence collected under civil procedures to impose criminal sanctions. Such measures do not seem to be entirely effective, however, as “*the huge procedural diversity at the national level made it difficult even to determine when the information was actually ‘exchanged’*”.²⁶⁰¹ Procedural minimum harmonization (at best) does not ensure a level playing field. In reality, there are differences among the resources and functioning of the NCAs as well as the procedural environment in which they operate nationally. Differences in procedural frameworks matter in view of the re-allocation possibilities within the ECN, even at late stages of the proceedings.²⁶⁰² Differences remain with regard to timing and timetables of national jurisdictions, investigative powers, the recognition of evidence, access to documents, or decision-making rules for instance.²⁶⁰³ Also the interpretation of the privilege against self-incrimination is an example of one of the areas of divergence between the procedural frameworks applicable to the various ECN authorities,²⁶⁰⁴ as are the differences in leniency programmes, for instance relating to the application of markers.²⁶⁰⁵ While according to EZRACHI “*secondary provisions—often procedural in nature—tend to be less susceptible to wider domestic interests and as such form better candidates for wide multinational convergence*”²⁶⁰⁶ this is contradicted by practitioners, who claim that procedural harmonisation is equally difficult as substantive harmonisation.

During the ECON Committee and European Commission Public Hearing on empowering the national competition authorities to be more effective enforcers of the EU competition rules, with sessions on enforcement powers and independence of NCAs when applying the EU competition rules, and leniency and sanctions in the Member States when enforcing the competition rules, the wish was expressed for greater coherency within the ECN as to how competition law is applied.²⁶⁰⁷ Competition Commissioner VESTAGER explained that the results of the public consultation, launched in November 2015, indicated a strong support for further action in particular with regard to guarantees

²⁵⁹⁹ These are limited to Article 2, which contains rules on the burden of proof that also apply in national proceedings, Article 13 allowing national authorities to reject complaints or close proceedings, and Article 5 which lists the decision types that national authorities must have at their disposal to implement the EU antitrust rules.

²⁶⁰⁰ A. Mundt, “Ten Years of ECN – Cooperation at its best” in D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae Civis – Liber Amicorum Jaques Steenbergen*, Gent, Larcier, 2014, 508.

²⁶⁰¹ F. Cengiz, “Multi-level governance in competition policy: The European Competition Network”, *European Law Review*, Vol. 35, No. 5, 2010, 669.

²⁶⁰² A. Mundt, “Ten Years of ECN – Cooperation at its best” in D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae Civis – Liber Amicorum Jaques Steenbergen*, Gent, Larcier, 2014, 510.

²⁶⁰³ M. Albers, “National Competition Laws, International Cooperation and Procedural Rights” paper for Cauffman, Caroline, Hao, Qian (eds), *Procedural Rights in Competition Law in the EU and China*, China-EU Law Series, Vol 3., Berlin, Heidelberg, Springer, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567001 (accessed July 2017), 3-4; OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 314.

²⁶⁰⁴ A. Mundt, “State of play of decentralized application of European competition law: collection and exchange of information within the ECN”, *Concurrences*, N°4-2014, 3.

²⁶⁰⁵ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 314.

²⁶⁰⁶ A. Ezrachi, “Sponge”, *Journal of Antitrust Enforcement*, Vol. 5, No. 1, 2017, 74.

²⁶⁰⁷ ECON Committee and European Commission Public Hearing on empowering the national competition authorities to be more effective enforcers of the EU competition rules, European Parliament, Brussels, 19 April 2016.

of independence, resources, enforcement tools to detect and investigate, fining powers, and leniency programmes. The first steps towards more empowered and effective NCAs have been taken in the form of ECN+. The rules proposed after the public hearing, in the form of a directive, will, once adopted, provide the national competition authorities with a minimum common toolkit and effective enforcement powers. These should ensure that NCAs can act independently and impartially when enforcing EU antitrust rules, have the necessary resources to do their work, both financial and human, have all the powers needed to gather all relevant evidence, in particular electronic evidence, have adequate tools to impose proportionate and deterrent sanctions for breaches of EU antitrust rules, for instance regarding parental liability and succession so that companies cannot escape fines through corporate re-structuring. Importantly, the proposal also foresees that NCAs will be able to enforce the payment of fines against infringing companies that do not have a legal presence on their territory. Furthermore, the proposal foresees coordinated leniency programmes, increasing the overall incentives for companies to participate. The importance of companies' fundamental rights is underlined and it is required that authorities respect appropriate safeguards for the exercise of their powers, in accordance with the EU Charter of Fundamental Rights.²⁶⁰⁸

B) Transparency and accountability

According to MONTI, “the ECN’s legitimacy is under scrutiny because its decisions lack transparency and channels of accountability.”²⁶⁰⁹ The functioning of the network is not fully transparent, first, due to opacities in Regulation 1/2003 and the Network Notice, and second, because of the many informal means of communication and cooperation that have arisen. This in turn has effect on the accountability of the network members.

One area of confusion for instance concerns the position of leniency applicants.²⁶¹⁰ A network member has the obligation to inform other ECN members about the beginning of an investigation pursuant to Article 11 (2)&(3) of Regulation 1/2003, even if this investigation is initiated as a result of a leniency application.²⁶¹¹ Leniency applicants are protected, however, in the sense that such information may not be used as the basis of an investigation by another member of the Network, whether under the competition rules of the Treaty or under national laws. This does not prevent the authority however to open an investigation on the basis of information received from other sources or to request, be provided with and use information with consent of the leniency applicant. This has caused confusion as on the one hand if an applicant cannot send an application simultaneously to all relevant competition authorities, it loses its privileged position if the information is circulated immediately and automatically within the ECN. The consent requirement does not remedy this situation, and it is claimed that the procedure suggested in the ECN Notice is not sufficiently clear.²⁶¹²

²⁶⁰⁸ European Commission, Press release, “Antitrust: Commission proposal to make national competition authorities even more effective enforcers for the benefit of jobs and growth”, IP/17/685, Brussels, 22 March 2017; Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, COM(2017) 142 final 2017/0063 (COD), 22 March 2017.

²⁶⁰⁹ G. Monti, “Independence, interdependence and legitimacy: the EU Commission, National Competition Authorities, and the European Competition Network”, EUI Working Papers, LAW 2014/01, 2.

²⁶¹⁰ For more examples, see D. Reichelt, “To what extent does the co-operation within the European Competition Network protect the rights of undertakings?”, *Common Market Law Review*, Vol. 42, 2005.

²⁶¹¹ Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101, 27.04.2004, recital 39.

²⁶¹² D. Reichelt, “To what extent does the co-operation within the European Competition Network protect the rights of undertakings?”, *Common Market Law Review*, Vol. 42, 2005, 768.

Network literature generally focused on the effectiveness of network-outcomes, before it focused its attention to internal procedures and accountability of members. Networks have generally been acclaimed for having high ‘output accountability’. However, their ‘process accountability’ sometimes shows significant flaws. The 2014 Report on 10 years of regulation 1/2003 indeed mainly engaged in an outcome assessment rather than a process- assessment.²⁶¹³ What is valid for the ECN is that the competition authorities should remain independent from their principals with political identities. This independence then also allows for a certain opaqueness. The level of transparency that a network should allow is difficult to determine, as it requires balancing of on the one hand administrative efficiency and protection from outside political interference, and on the other hand ensuring accountability. A distinction can thereby be made between accountability to the outside world and transparency within the network, providing a basis for so-called ‘peer-to-peer’ accountability. The ECN regime is also largely out of the scope of review of the Courts due to the lack of transparency and reliance on informal procedures and soft law.²⁶¹⁴

C) Due process

Linked to the lack of transparency are concerns regarding due process in the functioning of the Network. For instance, observations made by the Commission on envisaged NCA decisions are not open to the parties under investigation, who consequently cannot react.²⁶¹⁵ Only legal acts can be challenged by the companies concerned.²⁶¹⁶ More generally the parties subject to an investigation often lack the opportunity to respond. This is also the case with regard to the use of exchanged evidence, which cannot be challenged to the extent that it was legally gathered by the transmitting ECN member. Any domestic limitations to the use of transmitted evidence in the receiving ECN member are irrelevant because of the primacy of European law.²⁶¹⁷ A violation of domestic provisions indeed does not exclude exchange information within the ECN. Compliance with the domestic provisions on information gathering is not expressly required. Article 12(1) of Regulation 1/2003 allows the direct use of information exchanged regardless of provisions of national procedural law. According to REICHELT the rights of defence of undertakings cannot be sufficiently guaranteed if NCAs can use information regardless of the lack of uniform procedural law applicable to them and the Commission.²⁶¹⁸

REICHELT has further listed some of the opacities surrounding the ECN with regard to due process. For instance, it is unclear what should happen when the assessment of the legality of the gathering of information by the transmitting NCA was incorrect. Should the transmitting authority wait for a court decision? Can the receiving NCA use the information? Can one NCA refuse to carry out an investigation on behalf of another because it claims that the requesting NCA’s domestic legislation

²⁶¹³ See European Commission, Communication from the Commission to the European Parliament and the Council, “Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives”, COM(2014) 453, SWD(2014) 230}_{SWD(2014) 231, 9 July 2014.

²⁶¹⁴ F. Cengiz, “Multi-level governance in competition policy: The European Competition Network”, *European Law Review*, Vol. 35, No. 5, 2010, 671-675.

²⁶¹⁵ Ibid., 675-676.

²⁶¹⁶ D. Reichelt, “To what extent does the co-operation within the European Competition Network protect the rights of undertakings?”, *Common Market Law Review*, Vol. 42, 2005, 759.

²⁶¹⁷ K. Dekeyser & E. De Smijter, “The exchange of evidence within the ECN and how it contributes to the European co-operation and co-ordination in cartel cases”, *Legal Issues of Economic Integration*, Vol. 32, No. 2, 2005, 163-164.

²⁶¹⁸ D. Reichelt, “To what extent does the co-operation within the European Competition Network protect the rights of undertakings?”, *Common Market Law Review*, Vol. 42, 2005, 751, 777, 780.

provides insufficient protection? Would this go against the principle of assumed equivalence? What if the request is based on illegally gathered information? Paragraph 27 of the Network Notice even leaves it to the transmitting authority to decide whether or not to inform the receiving authority of “*whether the gathering of the information was contested or could still be contested.*”²⁶¹⁹ The fact that the ECN is based on mutual recognition of the member’s legal systems indeed implies that one member cannot evaluate the legal system of another. This does not mean, however, that issues cannot arise. This is not explicitly addressed by the legislation regulating the ECN.²⁶²⁰

With regard to information exchange among the NCAs and the Commission, it is unclear what information ‘necessary for the assessment of the case’ implies. This will vary depending on the case. Undertakings can therefore not predict with certainty what information will be transmitted, even more so since there is no obligation for the NCA to inform the undertaking of the request made by the Commission or other exchanges of information. In this way, the undertaking doesn’t know whether all relevant documents have been exchanged, or whether exculpatory documents could be missing.²⁶²¹

D) The network design failed when put to the test: Eurotunnel SeaFrance

While the ECN has indeed been successful, it has done so mostly in areas that were not its original focus point. Case-allocation and information-sharing are not the principal ways in which interdependence among the competition authorities has evolved. The ECN has primarily produced results as a policy-making network ensuring convergence among the NCAs. The ECN mainly engages in coordinating procedural issues, and in serving as a forum of discussion. Most often, information requested concerns how to handle a case in view of particular legal or economic difficulties.²⁶²² According to MUNDT, the treatment of related cases – interconnected cases pursued simultaneously by different ECN authorities – was exposed over the years as an area in need of additional soft cooperation tools and further good practices with regard to the possible impact of one authority’s decision on that of another.²⁶²³

Only little enforcement cooperation between NCAs in competition law cases has been reported. CENGİZ explained, however, that this should be seen as a success of the network, as the ECN was designed to minimise the number of authorities involved in a single investigation as a precaution against inconsistency, rather than a failure, even if the Commission does not seem to think so. There is evidence that suggest that informal cooperation has been developed, outside the original network design.²⁶²⁴ While relatively few cases have been re-allocated and there has not been any notable legal challenge against the operation of the network or disturbances in the relations among competition authorities,²⁶²⁵ one can nevertheless wonder whether this is truly the merit of the Network, as it

²⁶¹⁹ Commission Notice on cooperation within the Network of Competition Authorities, *OJ C* 101, 27.04.2004, recital 27.

²⁶²⁰ D. Reichelt, “To what extent does the co-operation within the European Competition Network protect the rights of undertakings?”, *Common Market Law Review*, Vol. 42, 2005, 752.

²⁶²¹ *Ibid.*, 761, 766.

²⁶²² G. Monti, “Independence, interdependence and legitimacy: the EU Commission, National Competition Authorities, and the European Competition Network”, EUI Working Papers, LAW 2014/01, 2, 17.

²⁶²³ A. Mundt, “Ten Years of ECN – Cooperation at its best” in D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae Civis – Liber Amicorum Jaques Steenbergen*, Gent, Larcier, 2014, 512.

²⁶²⁴ F. Cengiz, “Multi-level governance in competition policy: The European Competition Network”, *European Law Review*, Vol. 35, No. 5, 2010, 668.

²⁶²⁵ G. Monti, “Independence, interdependence and legitimacy: the EU Commission, National Competition Authorities, and the European Competition Network”, EUI Working Papers, LAW 2014/01, 16.

seems to have failed when faced with the problematic *Eurotunnel SeaFrance* case. This case is one of the first remarkable clashes between the competition regimes of two major EU member states.²⁶²⁶ Indeed, up until then, “the ECN has not yet had to face a crisis situation, an actual or potential conflict with significant connections to the national economic and political interests.”²⁶²⁷ The management and resolution of such a crisis situation indeed is a strong indicator of the success of ECN as a network.²⁶²⁸

The facts of this case are quite complex and unique, involving insolvency, employment, as well as competition law aspects. Only a compressed version of the facts will be provided here, in view of its relevance for cooperation under the ECN. After a period of heavy losses, ferry company SeaFrance went into liquidation in November 2011, putting a halt to its ferry services across the English Channel from Calais to Dover. In January the liquidator of SeaFrance was ordered by a French court to sell the assets. This triggered an obligation to make SeaFrance’s employees redundant, save those required to assist with the liquidation. At the same time, SeaFrance’s parent company was allowed to initiate a job-saving plan for former SeaFrance employees (*Plan de Sauvegarde de l’Emploi*), facilitating the return to work of the latter by inter alia providing payments to businesses that took on those employees. Group Eurotunnel SE (GE), together with a workers’ cooperative aiming to secure employment for SeaFrance’s former staff via the continuation of its ferry services (*SCOP – Société Coopérative de Production SeaFrance SA*), acquired from the liquidator three of SeaFrance’s four vessels and certain other intangible assets. The ferry service would be operated by (a subsidiary of) GE while the ships would be operated and manned by SCOP.²⁶²⁹ The services were finally recommenced as MyFerryLink in August 2012.²⁶³⁰

This acquisition by GE was cleared by the French competition authority, but prohibited by the then UK Competition Commission, to whom the case was referred by the Office of Fair Trade (OFT),²⁶³¹ based on an investigation of the impact of the transaction on competition on the cross-Channel routes. The OFT required that GE either cease its ferry service from Dover using the passenger ships acquired from SeaFrance for a period of ten years or divest the MyFerryLink business. The Competition Commission established its jurisdiction based on the fact that in its view the acquisition by GE of the SeaFrance assets created a ‘relevant merger situation’ under the 2002 Enterprise Act. This in turn depended on whether the acquisition of GE and SCOP constituted an ‘enterprise’ or rather the assets of an empty enterprise.²⁶³² This is exactly what was challenged before the UK Competition Appeal Tribunal (CAT), which found that the UK Competition Commission had rightly judged that GE/SCOP had acquired an ‘enterprise’.²⁶³³ This led to another appeal to the Court of Appeal, which then clarified that “what had been acquired was not the “enterprise” formerly carried on

²⁶²⁶ J. Briggs & D. Oakes, “Eurotunnel and the short sea battle between the French and the English: A U.S. perspective”, *Concurrences*, N°1-2014, 17.

²⁶²⁷ F. Cengiz, “Multi-level governance in competition policy: The European Competition Network”, *European Law Review*, Vol. 35, No. 5, 2010, 671.

²⁶²⁸ *Ibid.*, 671.

²⁶²⁹ Judgment, *Société Coopérative de Production SeaFrance SA (Respondent) v The Competition and Markets Authority and another (Appellants)*, Michaelmas Term, [2015] UKSC 75, 16 December 2015, 2.

²⁶³⁰ A. Nourry & D. Harrison, “The Eurotunnel case continues - When is an enterprise not an enterprise?”, *Clifford Chance LLP Competition Law Insight*, 7 July 2015, 12.

²⁶³¹ Currently the Competition and Markets Authority.

²⁶³² http://www.catribunal.org.uk/files/1235_SCOP_Judgment_Of_the_Supreme_Court_161215.pdf, 2.

²⁶³³ A. Nourry & D. Harrison, “The Eurotunnel case continues - When is an enterprise not an enterprise?”, *Clifford Chance LLP Competition Law Insight*, 7 July 2015, 12. Also see https://assets.publishing.service.gov.uk/media/5329dfe440f0b60a76000354/eurotunnel_summary.pdf (accessed July 2017).

by *SeaFrance*, but only the means to construct a similar but new enterprise.”²⁶³⁴ The UK’s competition authority therefore did not have the jurisdiction to impose remedies.²⁶³⁵

In this case, the same merger, notified by the same undertakings and regarding the same relevant markets was investigated by two authorities within the ECN, leading to entirely opposing results, despite virtually identical competition regimes with respect to mergers and acquisitions. The French competition authority authorised the merger subject to behavioural remedies, but the UK Competition Commission, on the basis of a different counterfactual to which the post-merger effects were to be compared, required additional structural remedies. Informal and formal exchanges between both authorities – the French authority allegedly contributed to the market test in the UK – did not lead to convergence in the analysis or the result.²⁶³⁶ There is no official information however on whether and to what extent discussions between both authorities took place, for instance to achieve convergence regarding the appropriate counterfactual to be relied upon.²⁶³⁷ It is claimed that the UK and France did cooperate and discussed both approach and evidence.²⁶³⁸

The ECN cooperation-mechanisms seem largely absent in this case. According to the Network Notice case-allocation issues may arise if several authorities consider themselves well-placed to act. Network members should, however, attempt to re-allocate cases to a single competition authority as often as possible. If issues regarding re-allocation should arise, they should be resolved swiftly, and competition authorities should endeavour to reach an agreement on possible re-allocation and on potential modalities for parallel action. If authorities do engage in parallel action on a certain case, they should attempt to coordinate their action to the extent possible. If despite these measures Network members envisage conflicting decisions in the same case, the Commission can apply Article 11(6) of Regulation 1/2003, and take over the case.²⁶³⁹ It would therefore seem that in this situation the Member States failed to come to an optimal solution, and the Commission could have made use of Article 11(6) to resolve the matter, but it did not do so, nor did the Advisory Committee, the forum where experts from the various competition authorities discuss individual cases and general issues of EU competition law, come together.²⁶⁴⁰ It was merely stated that formal as well as informal

²⁶³⁴ Judgment, *Société Coopérative de Production SeaFrance SA (Respondent) v The Competition and Markets Authority and another (Appellants)*, Michaelmas Term, [2015] UKSC 75, 16 December 2015, 2.

²⁶³⁵ Also see J. Briggs & D. Oakes, “Eurotunnel and the short sea battle between the French and the English: A U.S. perspective”, *Concurrences*, N° 1-2014, 17.

²⁶³⁶ B. Laserre, ““The future of the European Competition Network”, *Italian Antitrust Review*, No. 0, 2013, 12; J. Briggs & D. Oakes, “Eurotunnel and the short sea battle between the French and the English: A U.S. perspective”, *Concurrences*, N° 1-2014, 16.

²⁶³⁷ J. Briggs & D. Oakes, “Eurotunnel and the short sea battle between the French and the English: A U.S. perspective”, *Concurrences*, N° 1-2014, 17.

²⁶³⁸ “Crossing Merger Control Frontiers: What are the new borders?”, 3rd Annual conference organized by *Concurrences* and Paul Hastings, Paris, 30 October 2015.

²⁶³⁹ Commission Notice on cooperation within the Network of Competition Authorities, *OJ C* 101, 27.04.2004, recital 6, 7, 18, 13, & 54.

²⁶⁴⁰ *Ibid.*, recital 58. This became apparent after a request for documents by the author, asking whether the Advisory Committee set up in the framework of the European Competition Network had issued an opinion on the Eurotunnel MyFerryLink SeaFrance case: “The merger between Eurotunnel and SeaFrance has not been assessed by the European Commission but by the National Competition Authorities of the United Kingdom and France. Therefore, no Advisory Committee has been set up in the case at stake. No other document has been identified referring to specific discussions on this case in the context of other bodies composed of representatives of the European Commission and the National Competition Authorities in the field of merger control.” Brussels, COMP/F.4/IMI/(2016)/5008. The Advisory Committee of member states generally hears and comments on the Commission’s preliminary draft decisions as a consultative body. (H. Kassim & K. Wright, “Network governance and the European Union: the case of the European Competition Network”, paper for ARENA Workshop ‘The transformation of the executive branch of government in Europe’, University of Oslo, 4-6 June 2009, 11.)

contacts took place between both agencies “in accordance with the good practices established in the framework of the ECN”,²⁶⁴¹ but that these did not result in convergent analyses.²⁶⁴² The case caused heavy controversy and affected relations among competition authorities. It is regrettable that the Network-mechanisms could not prevent this situation.

4.5.1.4 Lessons that can nevertheless be drawn from this unique network

Even though the ECN has unique characteristics, some lessons may nevertheless be drawn from its functioning that are relevant for international competition cooperation more generally.

First, the fact that all EU member states must apply the EU competition rules, and must acknowledge each other’s competition systems, largely contributed to the ECN’s success. This was confirmed by the French delegation during the OECD Roundtable on International Cooperation in Cartel Investigations, where it attributed the success of the ECN to four elements in particular: “*the institutional framework of the EU Member States, the economic union, the single market and a single set of rules enforced by the common judicial framework.*”²⁶⁴³ A common, or at least similar legal framework therefore seems to be a prerequisite for effective international enforcement cooperation.

Secondly, the importance of procedural convergence should not be underestimated. Often substantive convergence takes centre stage, but national procedures to pursue competition law infringements tend to diverge more than substantive law standards. It is claimed that agreement on substance is easier to reach than on procedure, as procedural rights and obligations are more strongly embedded in the national legal culture and traditions.²⁶⁴⁴ Soft law tools are often insufficient then to stimulate convergence.²⁶⁴⁵ This is confirmed by CAPOBIANCO from the OECD, stating that while indeed procedures differ greatly among jurisdictions, they are very difficult to harmonise. He mentioned the failed attempt to develop a merger filing form, where agreement was impossible because every party wanted to add their own features. For international businesses, differences in procedure are equally difficult to navigate as substantive differences between jurisdictions. Both formal and informal notification timelines for instance vary hugely.²⁶⁴⁶ The Commission

²⁶⁴¹ « en accord avec les bonnes pratiques établis dans le cadre du REC »

²⁶⁴² B. Lasserre, “Le réseau européen de concurrence: entre réussites et défis” dans D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae Civis – Liber Amicorum Jaques Steenbergen*, Gent, Larcier, 2014, 480.

²⁶⁴³ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 313.

²⁶⁴⁴ M. Albers, “National Competition Laws, International Cooperation and Procedural Rights” paper for Cauffman, Caroline, Hao, Qian (eds), *Procedural Rights in Competition Law in the EU and China*, China-EU Law Series, Vol 3., Berlin, Heidelberg, Springer, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567001 (accessed July 2017), 3; “Crossing Merger Control Frontiers: What are the new borders?”, 3rd Annual conference organized by Concurrences and Paul Hastings, Paris, 30 October 2015. See W. E. Kovacic, P. Mavroidis, D. Neven, “Merger control procedures and institutions: a comparison of the EU and US practice”, EUI Working Papers, RSCAS 2014/20, for an illustration of such embeddedness.

²⁶⁴⁵ European Commission, Communication from the Commission to the European Parliament and the Council, “Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives”, COM(2014) 453, SWD(2014) 230}_{SWD(2014) 231, 9 July 2014, 10.

²⁶⁴⁶ “Crossing Merger Control Frontiers: What are the new borders?”, 3rd Annual conference organized by Concurrences and Paul Hastings, Paris, 30 October 2015.

acknowledged that to enhance future EU competition enforcement, ensuring further convergence of national procedures and sanctions applying to infringements of EU competition rules is key.²⁶⁴⁷

While MARSDEN was right to claim that cooperation evolves most naturally and is most stable when it is not required,²⁶⁴⁸ the ECN nevertheless demonstrates that some form of hard obligations is not detrimental to the cooperation process and does not necessarily lead to overflowing enforcement agendas. The OECD confirmed that the obligatory sharing of information between the Commission and the Member States “often allows for the prosecution of cartel cases that would lack sufficient evidence in any individual jurisdiction.”²⁶⁴⁹ Hard obligations moreover do not imply that use must be made of ‘hard enforcement.’ The reputation of agencies concerning the delivery of good work is crucial for their functioning and existence.²⁶⁵⁰ The statistics of the ECN then create a basis of comparison encouraging Member States and national competition authorities that perform relatively less well to take measures to improve their behaviour.²⁶⁵¹

Finally, a lot of the communication that occurs within the ECN happens on an informal basis. While it is laudable that such close ties are created between European enforcers and such interaction can strengthen internal trust and identity within the network, informality also risks creating opacity in network management, which may lead to accountability and due process problems.²⁶⁵² MONTI even wondered whether the amount of cooperation resting upon informal arrangements is compatible with the rule of law.²⁶⁵³ MARSDEN rightly pointed out that strong procedural safeguards are absolutely necessary.²⁶⁵⁴

2.2 A distinct complementary role

From what is stated above, it becomes clear that the multilateral forums dealing with competition law have a distinct, complementary role to fulfil, both compared to the bilateral plane, as well as reciprocally.

2.2.1 Complementarity between the multilateral and bilateral plane

2.2.1.1 A different focus

²⁶⁴⁷ European Commission, Communication from the Commission to the European Parliament and the Council, “Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives”, COM(2014) 453, SWD(2014) 230}_{SWD(2014) 231, 9 July 2014, 8.

²⁶⁴⁸ Intervention by P. Marsden, ECON Committee and European Commission Public Hearing on empowering the national competition authorities to be more effective enforcers of the EU competition rules, European Parliament, Brussels, 19 April 2016.

²⁶⁴⁹ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 313.

²⁶⁵⁰ G. Monti, “Independence, interdependence and legitimacy: the EU Commission, National Competition Authorities, and the European Competition Network”, EUI Working Papers, LAW 2014/01, 1.

²⁶⁵¹ W. Wils, “Ten Years of Regulation 1/2003” in D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae Civis – Liber Amicorum Jaques Steenbergen*, Gent, Larcier, 2014, 627.

²⁶⁵² F. Cengiz, “Multi-level governance in competition policy: The European Competition Network”, *European Law Review*, Vol. 35, No. 5, 2010, 662.

²⁶⁵³ G. Monti, “Independence, interdependence and legitimacy: the EU Commission, National Competition Authorities, and the European Competition Network”, EUI Working Papers, LAW 2014/01, 16.

²⁶⁵⁴ ECON Committee and European Commission Public Hearing on empowering the national competition authorities to be more effective enforcers of the EU competition rules, European Parliament, Brussels, 19 April 2016.

A) Stimulate convergence

Already in 1995 the Commission acknowledged that the EU should simultaneously work towards deepening its bilateral efforts and towards a multilateral framework on competition principles.²⁶⁵⁵ Such a strategy indeed seems worthwhile, as both routes have different focuses. Bilateral cooperation is more focused on intensive case-specific cooperation. In case-specific cooperation more defined rights and obligations for both parties are desirable.²⁶⁵⁶ While bilateral agreements can have the effect of creating convergence, this goal is much more central in the different multilateral forums analysed above. Multilateral forums have the resources and clout to gather substantial data and via thorough analysis identify superior practices.

As pressures towards convergence are increasing, the role of multilateral forums will only gain in importance. Procedural convergence in particular will be a difficult hurdle to tackle.²⁶⁵⁷ With regard to mergers, for instance, strong calls for action are heard from the private sector to develop greater convergence. There is demand for the streamlining of the process, starting with the type of transactions that require review (aligning of notification thresholds) and the information needed to do so (the elimination of uncommon requirements). There is a divide in particular between more advanced and younger agencies. Whereas the large jurisdictions already require a detailed analyses of the predicted competitive impact of large transactions, asking to produce extensive evidence, younger agencies increasingly ask additional information of which the relevance is not always obvious.²⁶⁵⁸ Some jurisdictions require filing when there is not even a link with the country, resulting in the restructuring of mergers simply because of the administrative burden on companies.²⁶⁵⁹ Increased transparency and legal certainty regarding the review process are necessary.²⁶⁶⁰ This cannot be done solely via bilateral contacts. Another example relates to inconsistencies across leniency policies. The gradual elimination of conflicting requirements and increased consistency would encourage leniency applicants to come forward in a wider number of jurisdictions. This in turn might then stimulate the granting of waivers of confidentiality.²⁶⁶¹

Convergence should moreover not only occur between regulations, but also with regard to how such regulations are applied and interpreted. While bilateral agreements are concluded between either agencies or governments, multilateral forums could more easily reach out to the judiciary, in order to come to an alignment of regulators, enforcers, and the judiciary. Divergence at the court level is at times more pronounced than disagreements among enforcement agencies, as illustrated by the implementation of comity-considerations (see above, Part II, 2.2.4).²⁶⁶²

²⁶⁵⁵ U. Aydin, “Promoting Competition: European Union and the Global Competition Order”, paper prepared for presentation at the European Union Studies Association 11th Biennial International Conference, Los Angeles California, 23-25 April 2009, 21.

²⁶⁵⁶ A. Schaub, “International Co-operation in Antitrust matters: making the point in the wake of the Boeing/MDD proceedings”, *Competition Policy Newsletter*, No. 1, February 1998.

²⁶⁵⁷ Interview with Commission official.

²⁶⁵⁸ Interview of Chief Legal Counsel Camilla Holtse (Maersk) by Kostis Hatzitaskos (Cornerstone Research) in view of their panel “international mergers: working across multiple jurisdictions”, Global Antitrust Economics Conference, Chicago, 7 October 2016.

²⁶⁵⁹ “Crossing Merger Control Frontiers: What are the new borders?”, 3rd Annual conference organized by Concurrences and Paul Hastings, Paris, 30 October 2015.

²⁶⁶⁰ Result of author’s law firm survey (see Annex I).

²⁶⁶¹ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 39, 56.

²⁶⁶² E. Fox, “Networking the world”, *Concurrences*, N° 4-2011, 4.

Finally, multilateral forums are also better placed to follow-up on the evolutions in individual jurisdictions and the convergence or divergence that occurs. HOLTSE, Chief legal counsel and head of competition compliance of Maersk Line stated for instance that the rules of some 125 jurisdictions are constantly changing, which is extremely difficult to monitor, especially for smaller companies. As an example she mentioned the disruption of the amnesty programme in Ukraine.²⁶⁶³

B) Create momentum, stimulate advocacy, and ensure inclusiveness

Another role more suited for multilateral forums is the creation of momentum, stimulation of advocacy efforts, and including a broad constituency in the process. OECD initiatives for instance have in the past been able to create and maintain momentum with regard to international cooperation, and “[have] been one of the main stimuli to greater co-operation between agencies.”²⁶⁶⁴ Multilateral forums can not only stimulate agency cooperation, they can also increase general support for such cooperation. Through their work, they can increase the confidence in and legitimacy of the process, by ensuring that decisions are grounded in the application of sound competition principles.²⁶⁶⁵ They can “improve perceptions of the overall benefits of international cooperation in competition enforcement [...]”²⁶⁶⁶ This is more difficult via bilateral agreements due to the limited inclusiveness and general opaqueness that still surrounds the negotiation of such agreements. PAEMEN indeed reported growing opposition towards bilateral trade negotiations for instance, in particular from NGO’s, who criticize the lack of transparency and participation or input by stakeholders or civil society during the negotiations.²⁶⁶⁷ Equally, bilateral enforcement agreements do not generally counter for instance the inclination jurisdictions may have to under-enforce their competition laws for their export-industries. Multilateral forums can contribute to arming the importing jurisdiction with the tools needed to be an effective enforcer.²⁶⁶⁸

Multilateral forums offer the rather unique opportunity to engage both government policymakers as well as participants from non-government constituencies. As indicated above, such input often proves to be invaluable.²⁶⁶⁹ Inclusiveness does not only imply involvement of non-governmental actors, however. Bilateral agreements are generally only concluded when two parties have rather similar competition regimes, or are at least aware of common cases and the functioning of the other authority. If agencies have insufficient prior interaction, this will result in a lack of awareness of

²⁶⁶³ “Crossing Merger Control Frontiers: What are the new borders?”, 3rd Annual conference organized by Concurrences and Paul Hastings, Paris, 30 October 2015.

²⁶⁶⁴ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 5.

²⁶⁶⁵ R. Hoffinger, “Reflections on the application of multiple competition law regimes to global businesses and markets”, *Concurrences*, N° 1-2014, 2.

²⁶⁶⁶ OECD, Discussion on International Co-operation, Contribution of the United States, DAF/COMP/WP3/WD(2012)24, 12 June 2012, 10.

²⁶⁶⁷ H. Paemen, “A new trade policy” in D. Arts, W. Devroe, R. Foqué, K. Marchand, I. Verougstraete (eds), *Mundi et Europae Civis – Liber Amicorum Jacques Steenbergen*, Gent, Larcier, 2014, 138.

²⁶⁶⁸ E. Elhauge & D. Geradin, *Global Competition Law and Economics*, 2nd ed., Oxford and Portland Oregon, Hart Publishing, 2011, 1231.

²⁶⁶⁹ W.E. Kovacic, “Nine next steps for transatlantic antitrust policy cooperation”, *CPI Antitrust Chronicle*, Vol. 1, October 2011, 5.

other's procedures or legal regimes which in turn will hinder cooperation.²⁶⁷⁰ Multilateral forums offer less acquainted agencies the opportunity to meet, and understand each other's functioning.²⁶⁷¹

C) Capacity building and technical assistance

In the future, capacity building and technical assistance will only become more important, as the economy becomes even more globally integrated, and jurisdictions increasingly develop competition law regimes.²⁶⁷² Commitments and capabilities will need to be aligned. Multilateral forums can study past experiences and identify where issues arise and efficiency and effectiveness can be increased. They can help with performance reviews of competition agencies globally.²⁶⁷³

Moreover, capacity building and technical assistance are important in the deterrence of forum shopping. Companies aiming to achieve profit maximization will seek to operate in countries with no competition regulation or weak enforcement, often due to a lack of trained personnel, resources, experience or due to government corruption.²⁶⁷⁴ In these instances international support is crucial. Institutional strengthening is a pre-condition for the enactment of effective competition laws.²⁶⁷⁵ A shared understanding of the need for high standards of transparency, independence, and impartiality must be developed, so that strong and independent regulators can be in charge.²⁶⁷⁶ Younger agencies and agencies from developing countries are generally welcoming of this type of support from more experienced jurisdictions.²⁶⁷⁷ Best practices for instance are largely institutionalizing existing practices, but by doing so the latter are made more transparent so that they can be used more widely.²⁶⁷⁸

One particular area where synergies are not yet created is with regard to North-South cooperation. This element of cooperation is still relatively underdeveloped. The OECD reported little evidence of effective cartel enforcement cooperation between competition authorities in developed and developing country authorities,²⁶⁷⁹ and there are only few agreements between developed and developing countries or between large and small countries.²⁶⁸⁰ This is in part linked to the absence of a strategy with regard to bilateralism as mentioned above. The priorities of younger agencies should

²⁶⁷⁰ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 82.

²⁶⁷¹ H. Dieckmann, "The Benefits of Cooperation between Competition Authorities", presented at the Inaugural Symposium of the Competition Policy Research Center, Tokyo, 20 November 2003, 10.

²⁶⁷² D. D. Sokol, "International Antitrust Institutions", in A. Guzman (ed.), *Cooperation, Comity, and Competition*, New York, Oxford University Press, 2011, 190.

²⁶⁷³ "Crossing Merger Control Frontiers: What are the new borders?", 3rd Annual conference organized by Concurrences and Paul Hastings, Paris, 30 October 2015.

²⁶⁷⁴ N. Ormonov, "Exchange of Information in the Enforcement of Antitrust Laws", *Asper Review of International Business & Trade Law*, Vol. 6, 2006, 366.

²⁶⁷⁵ M. Taylor, *International competition law – A new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 103.

²⁶⁷⁶ Almunia, Joaquin, "Competition policy and the global economy", Speech at the IBA 10th Competition Mid-Year Conference, Cape Town, 7 March 2014.

²⁶⁷⁷ E. Fox, "Linked-In: Antitrust and the Virtues of a Virtual Network", Law & Economics Research Paper Series, Working Paper No. 09-27, July 2009, 151.

²⁶⁷⁸ H. Dieckmann, "The Benefits of Cooperation between Competition Authorities", presented at the Inaugural Symposium of the Competition Policy Research Center, Tokyo, 20 November 2003, 10.

²⁶⁷⁹ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 45.

²⁶⁸⁰ F. Jenny, "International Cooperation on Competition: Myth, Reality and Perspective", *The Antitrust Bulletin*, Vol. 48, Winter 2003, 979.

be to first build up experience and use their resources to “*establish credible competition institutions and develop the necessary instruments and policies to become effective cartel enforcers.*”²⁶⁸¹ Only then can they “*harness the benefits of greater co-operation in the same manner as more experienced jurisdictions*”²⁶⁸² Factors contributing to this situation are a lack of investigatory powers, a lack of functioning leniency programmes, limited human resource capacity, a higher risk of making mistakes, and national courts with insufficient knowledge. Therefore, focus should be directed towards gathering institutional capacity. Technical assistance and training courses can help achieve this.²⁶⁸³ Trust is often referred to as a central element in cooperation. If one assumes that smaller countries and in particular developing countries have younger and less experienced competition authorities, the trust can be lacking to engage in cooperation.²⁶⁸⁴ While bilateral agreements can spark further trust between authorities, a minimum should already be present. This can be created in multilateral venues, where younger authorities can learn from others and share their own experience, as well as meet their peers. Practice indicates that trust is mainly earned via personal contacts, and is less connected to the overall experience or reputation of a certain authority.²⁶⁸⁵ Here again multilateral forums can indeed cooperate and play an important role. Competition authorities in developing countries find themselves in somewhat of a Catch-22 situation. Indeed, before more experienced authorities will cooperate with these agencies, they need to acquire the necessary experience, but in order to do so, they need to cooperate to gain insight.²⁶⁸⁶ Because cooperation always takes place on a voluntary basis, case teams must see added value, which often results in difficulties for smaller countries to engage bigger ones to cooperate, even if cooperation could be very useful to the former.²⁶⁸⁷

D) Coherence

Finally, a benefit that multilateral forums can offer, in particular those encompassing more than one policy field, is coherence. Globally optimal solutions require more than only bilateral agreements. Coherence among bilateral arrangements, but also across policy fields is required, as certain interdependencies may exist.²⁶⁸⁸ PIILOLA rightly stated that “[a] forum with a mandate to deal with all of these divergent, yet interdependent, policy areas has the capacity to consider those interactions and adopt policies which do not counteract or frustrate the measures taken with respect to other policy areas.”²⁶⁸⁹ One particular complication follows from the fact that competing regulatory structures are being spread, inter alia via bilateral agreements. This refers to allegations of regulatory export by both the EU and the US. If this is done without ‘any grand scheme or blueprint’, the multilateral trading system might be

²⁶⁸¹ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 46.

²⁶⁸² Ibid.

²⁶⁸³ Ibid.

²⁶⁸⁴ Trust can be missing in a certain relationship due to for instance an unstable or weak legal framework, limited transparency with regard to the procedures followed, or inadequate safeguards with regard to due process and rights of defence. In competition cases, this creates the perception that sensitive or confidential information might be leaked or misused. There is no confidence in the ability of the requested country to provide qualitative information for use in the requesting country’s own investigation. (OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 47.)

²⁶⁸⁵ Interview with official from an ECN member authority.

²⁶⁸⁶ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 47.

²⁶⁸⁷ F. Jenny, “International Cooperation on Competition: Myth, Reality and Perspective”, *The Antitrust Bulletin*, Vol. 48, Winter 2003, 979.

²⁶⁸⁸ A. Piilola, “Assessing theories of global governance: a case study of international antitrust regulation”, *Stanford Journal of International Law*, Vol. 39, 2003, 240, 248.

²⁶⁸⁹ Ibid., 211.

damaged.²⁶⁹⁰ A DG Trade official stated that despite the increased use of FTAs, the WTO remains a priority as it is the only platform able to address systemic issues, referring to domestic regulatory issues, and ensure non-discrimination.²⁶⁹¹

2.2.1.2 What multilateralism and bilateralism can do for each other

While the multilateral plane therefore has a distinct role to play compared to bilateralism, it can also promote the latter. First, convergence, in particular with regard to procedures, generally enables enforcement cooperation in general.²⁶⁹² Formal bilateral cooperation can indeed be facilitated due to the degree of convergence that was created via preceding multilateral work, and the mutual trust that was created in that process.²⁶⁹³ Multilateral forums can also promote bilateral cooperation in a more targeted manner. One reason for instance why rather innovative initiatives such as the IEAA, the UK overseas information gateway, or the EU-Switzerland Agreement have not triggered similar initiatives is because there is too little knowledge on their functioning outside the countries already engaging in such cooperation.²⁶⁹⁴ Bilateral cooperation may not have reached its full potential due to insufficient knowledge about its use and utility.²⁶⁹⁵ Multilateral forums offer a platform to educate competition agencies and governments on how bilateral cooperation can lead to increased expertise and how to such gains can be achieved. DABBAH rightly claims that “[b]y including bilateralism within the remit of a centralized platform, the focus on bilateralism can be shifted from that of a purely national affair to a strategy with an international component.”²⁶⁹⁶ Such efforts currently seem to be absent from the agendas of the main multilateral forums, while they could help younger authorities in particular to more readily identify appropriate and willing partners. A grand strategy, or coherent long-term vision with regard to the role of bilateralism in the internationalization of competition law is lacking. Multilateral forums could steer the international community away from the perception that bilateralism is only to be considered when parties realize their commonalities, and towards the contribution that it could make in advancing competition law and policy, and achieving convergence.²⁶⁹⁷ In the other direction, the more bilateral cooperation takes place, the more chances for a successful multilateral agreement increase, as experiences with cooperation grow.

2.2.2 Complementarity among the multilateral forums

While it has been established that the multilateral plane has a distinct role to play compared to bilateral relations, the different multilateral forums should equally ensure that there is no overlap among them and that synergies are created. According to HOLLMAN and KOVACIC, the ICN, the OECD, and UNCTAD are rivals in major respects, addressing similar issues, supplying complementary or even overlapping policy products, and holding largely the same principle

²⁶⁹⁰ Ibid., 29.

²⁶⁹¹ GREEN -GEM Summer School "Competing for growth, trade & influence - The externalisation of the EU's policies through: multilateral governance, interregionalism, & global networks", 31 August- 5 September 2014.

²⁶⁹² OECD, Hearing on Enhanced Enforcement Cooperation, Paper by John Temple Lang, "Aims of enhanced international cooperation in competition cases", DAF/COMP/WP3(2014)7, 28 May 2014, 5.

²⁶⁹³ A. Piilola, "Assessing theories of global governance: a case study of international antitrust regulation", *Stanford Journal of International Law*, Vol. 39, 2003, 247.

²⁶⁹⁴ OECD, Limitations and constraints to international co-operation, Issues paper by the secretariat, DAF/COMP/WP3(2012)8, 23 October 2012, 6.

²⁶⁹⁵ M. Dabbah, "Future directions in bilateral cooperation: A policy perspective" in A. Guzman (ed.), *Cooperation, Comity, and Competition Policy*, New York, Oxford University Press, 2011, 299.

²⁶⁹⁶ Ibid., 299.

²⁶⁹⁷ Ibid., 298-299.

‘shareholders’. A lack of cooperation and coordination can then lead to resource losses, and lower quality products than could be achieved when such collaboration did take place.²⁶⁹⁸ Commonalities should be exploited in order to avoid duplication, create synergies, and make the best use of the available resources.²⁶⁹⁹ If not sufficiently diversified, an oversupply of international forums dealing with competition law issues could also lead to a certain amount of international network or relationship fatigue.²⁷⁰⁰ MARSDEN rightly claimed that more coordination should take place among the ICN, OECD, and UNCTAD.²⁷⁰¹ This is particularly important in times of reduced budgets. According to HOLLMAN and KOVACIC, “a failure to take this step could lead to the demise of competition programs within one or more of the existing networks.”²⁷⁰² A starting point could be to identify the characteristics and capabilities of all three institutions and map out the areas of existing and potential complementarity, in order to make better use of them and in this manner improve the collective effectiveness.

Indeed, each network has particularities and strengths. The OECD and UNCTAD for instance are somewhat better equipped to serve as suppliers of input than the ICN, without a secretariat, cannot easily generate on its own. The OECD was also identified as most suitable forum for in-depth exploration and debate concerning substantive policy issues, due to its government-membership.²⁷⁰³ On the other hand, the ICN has the benefit of having broad membership and their status as agencies rather than governments, which makes it the most suitable vehicle for convergence with regard to practically-oriented projects and consensus creation. The ICN’s leadership was moreover lauded for the development of “a more complete vision of how convergence might unfold.”²⁷⁰⁴ In a more abstract manner, complementarities can be found in the fact that the OECD, UNCTAD and the ICN indeed employ different perspectives when dealing with competition law issues, for instance with a trade or development component, or focusing mainly on the analytical underpinnings of competition law and policy or rather on implementation and consistency across jurisdictions.²⁷⁰⁵ While the ICN focuses on competition law and policy alone, which has its benefits, it is for instance also true that competition policy is strongly intertwined with other policy areas, such as industrial or trade policy. In this context, HOFFINGER states that competition laws “are increasingly pervaded by broad, open-ended

²⁶⁹⁸ H. M. Hollman & W. E. Kovacic, “The International Competition Network: Its Past, Current and Future Role” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 62-63. Complementarities are already achieved to a certain extent, for instance between the ICN and the OECD. For examples, see F. Jenny, “The International Competition Network and the OECD Competition Committee: Differences, Similarities and Complementarities” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 103.

²⁶⁹⁹ ICN, The ICN’s vision for its second decade, Presented at the 10th annual conference of the ICN, The Hague, Netherlands, 17-20 May 2011, 13; ICN, ICN Report on OECD/ICN questionnaire on international enforcement cooperation, 2012, 8.

²⁷⁰⁰ W.E. Kovacic, “Nine next steps for transatlantic antitrust policy cooperation”, *CPI Antitrust Chronicle*, Vol. 1, October 2011, 10.

²⁷⁰¹ P. Marsden, “Acta Non Verba: Keep ‘Talking Shop’, Don’t Become Another Talking Shop” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 139.

²⁷⁰² H. M. Hollman & W. E. Kovacic, “The International Competition Network: Its Past, Current and Future Role” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 91.

²⁷⁰³ *Ibid.*, 67, 72.

²⁷⁰⁴ *Ibid.*, 89.

²⁷⁰⁵ F. Jenny, “The International Competition Network and the OECD Competition Committee: Differences, Similarities and Complementarities” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 104.

qualifications, caveats and other political considerations.’²⁷⁰⁶ In such a scenario, the OECD would be the more suitable venue. The table below lists some of the distinctive features of the main forums dealing with competition law, indicating their complementary nature.

Table 1. The legal features of international organizations

	UNCTAD	OECD		WTO	ICN
		JG	GFC		
International coverage	Multilateral	Developed countries	Multilateral	Multilateral	Multilateral
Bindingness	Non-binding	Non-binding	Non-binding	Binding	Non-binding
Primary target	Developing countries	All countries	Developing countries	All countries	All countries
Issue mandate	Trade-plus	Trade-plus	Competition only	Trade-plus	Competition only
EU representation	Member states	Commission and member states		Commission and member states	DG Competition only

Figure 16. Source: C. Damro, “The new trade politics and EU competition policy: shopping for convergence and co-operation”, *Journal of European Public Policy*, Vol. 13, No. 6, September 2006, 881.

Some practical suggestions include first the ‘rationalisation’ of meetings, in a sense that their dates and topics could be coordinated so that both resources and time can be saved.²⁷⁰⁷ The same could be done with the number of guidelines, best practices, and recommendations. These could be merged together so that the creation of a uniform system for cooperation could be facilitated.²⁷⁰⁸ This could also happen for instance via the development of a common vocabulary creating clarity on the concepts used, for instance in the form of an inventory or glossary.²⁷⁰⁹ This might facilitate the negotiation of bilateral agreements as well.

2.3 Issues of network governance

It was said in the past that attempts to create a multilateral competition law agreement have failed because not enough nations had market-based economic systems with functioning competition systems.²⁷¹⁰ A multilateral agreement is very likely to fail today as well, however, for the opposite reason: an abundance of jurisdictions engaging in competition law enforcement. Consensus is difficult to find among so many nations with functioning competition systems, and international competition law issues are difficult to capture in strict rules, due to diverse and complex factual situations that often underlie competition cases, requiring detailed understanding of specific markets embedded in broader national regulatory environments. Networks may then offer a feasible alternative solution, in response to a changing regulatory environment subject to technological innovation, the expansion of domestic regulation, and economic globalization. Network governance

²⁷⁰⁶ R. Hoffinger, “Reflections on the application of multiple competition law regimes to global businesses and markets”, *Concurrences*, N° 1-2014, 2.

²⁷⁰⁷ P. Marsden, “Acta Non Verba: Keep ‘Talking Shop’, Don’t Become Another Talking Shop” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsels, Intersentia, 2011, 139.

²⁷⁰⁸ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 120.

²⁷⁰⁹ Interview with Commission official.

²⁷¹⁰ H. M. Hollman & W. E. Kovacic, “The International Competition Network: Its Past, Current and Future Role” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsels, Intersentia, 2011, 88.

is not free of flaws, however, and criticism has arisen in response to SLAUGHTER'S statement that transnational regulatory networks should be embraced as the architecture of a new world order.²⁷¹¹

2.3.1 Characteristics of network governance

According to COPPOLA, the international implications of many contemporary policy issues has fundamentally altered the separation between domestic and international policymaking, and sparked the creation of transnational networks of domestic officials to address these complex issues.²⁷¹² They form an answer to the patchwork of national regimes in a global marketplace, and ensure that the patches are nonetheless connected to a certain extent.²⁷¹³ SLAUGHTER referred to it as the disaggregation of the state, by which its component institutions all reach out beyond national borders.²⁷¹⁴ HALE and HELD classified a wide array of transnational governance mechanisms according to type and issue area.²⁷¹⁵ Their work indicated that with regard to economic regulation, the exclusive form of transnational governance is transgovernmental networks. Similarly, POLLACK and SCHAFFER argued that transgovernmental network governance is limited to policy areas with similar regulatory approaches, where regulators enjoy significant independence from political decision makers, whereas interstate litigation will prevail if such conditions are absent.²⁷¹⁶

International regulatory networks are generally characterized by selective membership of regulatory agencies and non-state actors rather than states, lack of international legal personality or status beyond that conferred by their organization under national law, and no formal voting procedures or formal supervision. They therefore form loosely structured, direct peer-to-peer ties via frequent interaction.²⁷¹⁷ They are self-organizing and generally include both state and non-state actors. The management of cross-border issues is facilitated via such direct collaboration among national administrators without the bureaucratic procedures of formal international institutions. An informal international rulemaking-process is created in this manner, which directly engages national officials. A platform for cross-fertilization and the fostering of common understandings is created, promoting voluntary convergence of domestic standards. The strength of networks is dependent on their internal cohesion, established via the existence of mutual trust and good faith, and their ability to reach consensus, and to define common goals.²⁷¹⁸

PIIOLA identified three types of global governance networks relevant for competition policy: intergovernmental, transgovernmental, and transnational. While the intergovernmental model involves states, via their heads of government, cooperating and bargaining within international regimes to reach an international agreement and incorporate it into an institutional framework, the

²⁷¹¹ P.-H. Verdier, "Regulatory networks and their limits", Harvard John M. Olin Center for Law, Economics, and Business Fellow's Discussion Paper Series, Discussion Paper No. 22, 9/2008, 7, 49, 56.

²⁷¹² M. Coppola, "One network's effect: the rise and future of the ICN", *Concurrences*, N° 3-2011, 222.

²⁷¹³ J. Fingleton, "Competition Agencies and Global Markets: The Challenges Ahead" in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 176.

²⁷¹⁴ A.-M. Slaughter, *A new world order*, Princeton, Princeton University Press, 2004, 31.

²⁷¹⁵ T. Hale & D. Held, "Editors' introduction: mapping changes in transnational governance" in T. Hale & D. Held (eds), *Handbook of transnational governance – institutions and innovations*, Cambridge, Polity Press, 2011, 13-14.

²⁷¹⁶ A. Piilola, "Assessing theories of global governance: a case study of international antitrust regulation", *Stanford Journal of International Law*, Vol. 39, 2003, 218, footnote 55.

²⁷¹⁷ J. Fingleton, "Competition Agencies and Global Markets: The Challenges Ahead" in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 191.

²⁷¹⁸ A. Piilola, "Assessing theories of global governance: a case study of international antitrust regulation", *Stanford Journal of International Law*, Vol. 39, 2003, 212-216, 247.

transgovernmental model implies the direct interaction of lower-level government officials, with a clear focus on the sub-state level. It departs from a horizontal and decentralised vision of global governance based on a technocratic, disaggregated state view, where sub-governmental experts take a central role. According to PILOLA, this form of governance arose because the growing complexity of highly sophisticated policy areas proved too much for the existing institutional capacities, leading to a delegation of normative power to independent specialized agencies. The transnational model, finally, underlines the role of global nongovernmental organizations and other non-state actors in shaping regulatory agendas and preferences. While the involvement of non-governmental actors in the global policy making process is to be applauded, it is not yet optimal. For instance, dialogues with non-governmental actors often take place on a sectorial basis, without any cross-cutting interaction. Business representatives for instance do not interact with environmental groups for instance to discuss common agendas.²⁷¹⁹

2.3.2 Benefits of network governance

As already touched upon, network governance has several benefits compared to more traditional modes of governance. First, they create efficiencies as they expand a state's capacity to confront transnational issues by bringing together specialised officials, advancing convergence of rules and regulations, and developing domestic regulatory capacity through experimentation, experience sharing, training, and technical assistance.²⁷²⁰ In this manner networks can increase the capacity of national governments to engage nonstate actors. Moreover, networks possess particular power due to their capacity to collect and disseminate information among a wide network of members.²⁷²¹ Second, it has been claimed that participation in transnational regulatory networks leads to a redefining of national interests. Due to the interaction that takes place and the internal dynamics of networks, national agencies become increasingly engaged in a common enterprise and commonly defined goals. This in turn may cause them to shift from their narrow purely domestic preferences towards advocacy of shared agendas. National agencies redefine their role to a certain extent from guardians of national interests to members of an international community, sharing common concerns.²⁷²² In other words, "*transnational networks facilitate the development of behavioral standards by creating shared expectations.*"²⁷²³ Another claimed benefit of network governance is that it can depoliticize issues by integrating them into a technocratic sphere.²⁷²⁴ Both domestic pressures as those associated with formal international organisations can in this manner be decreased. In part because of the lack of politics and the paralysis the latter may bring with it, networks also offer speed

²⁷¹⁹ Ibid., 208, 212, 214, 245.

²⁷²⁰ M. Coppola, "One network's effect: the rise and future of the ICN", *Concurrences*, N° 3-2011, 222; J. Fingleton, "Competition Agencies and Global Markets: The Challenges Ahead" in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 191.

²⁷²¹ A.-M. Slaughter, *A new world order*, Princeton, Princeton University Press, 2004, 32-33, 169.

²⁷²² A. Piilola, "Assessing theories of global governance: a case study of international antitrust regulation", *Stanford Journal of International Law*, Vol. 39, 2003, 215, 241; P.-H. Verdier, "Regulatory networks and their limits", Harvard John M. Olin Center for Law, Economics, and Business Fellow's Discussion Paper Series, Discussion Paper No. 22, 9/2008, 54.

²⁷²³ A. Piilola, "Assessing theories of global governance: a case study of international antitrust regulation", *Stanford Journal of International Law*, Vol. 39, 2003, 215. An important footnote that should be placed here however is that it is difficult to undertake the necessary empirical analysis of specific networks in order to draw conclusions regarding their effects. Formal social network analysis poses difficult methodological obstacles. See P.-H. Verdier, "Regulatory networks and their limits", Harvard John M. Olin Center for Law, Economics, and Business Fellow's Discussion Paper Series, Discussion Paper No. 22, 9/2008, 54.

²⁷²⁴ A. Piilola, "Assessing theories of global governance: a case study of international antitrust regulation", *Stanford Journal of International Law*, Vol. 39, 2003, 219.

and flexibility, making them particularly suited for complex and fast-evolving issues.²⁷²⁵ SLAUGHTER summarised the benefits of networks as the creation of convergence and informed divergence, the improvement of compliance with international rules, and the enhancement of the scope, nature, and quality of international cooperation.²⁷²⁶

2.3.3 Reasons for caution

While SLAUGHTER indeed puts forward network governance as making up the new world order, some caution is in place. The lack of deep knowledge with regard to regulatory networks becomes apparent when they are both criticised as being mere ‘talking shops’ as well as venues for unbridled rulemaking. It should be disclaimed, however, that the remarks made in this section are in no way meant to be exhaustive, but wish to illustrate that networks are not a ‘*deus ex machina*’ solution for problems of international governance.

On the one hand some blame regulatory networks of being an ineffective waste of resources, unable to tackle substantive issues. They are considered as not having the capacity to facilitate the complex trade-offs that are required to reach agreement on more contentious regulatory issues and leading only to watered-down standards and the appearance of agreement. It is difficult to measure exactly what the influence of network governance is and under what circumstances networks produce effective regulatory cooperation rather than shallow and suboptimal results. Systematic empirical support seems to be lacking.²⁷²⁷ On the other hand, regulatory networks are accused of enabling unchecked technocratic rule-making and being disguised regulatory export mechanisms (lacking democratic accountability, see below)²⁷²⁸ and vehicles of special interests for those who are ‘connected’.²⁷²⁹ As network governance was seen to represent a global trend towards soft law and informal regulatory cooperation, it was feared that the experts making up the networks would act outside the constraints of domestic political structures and the normal foreign affairs process. Some instances of networking can indeed have perverse effects, as they can be used by regulators to escape domestic constraints and pursue self-regarding aims. Not much attention has been given to the likeliness of such effects.²⁷³⁰ According to GRANOVERTER, “*While social relations may indeed often be a necessary condition for trust and trustworthy behavior, they are not sufficient to guarantee these and may even provide occasion and means for malfeasance and conflict on a scale larger than in their absence.*”²⁷³¹ Social interaction can therefore spread malpractice as much as it can counter it, while the emergence of rival coalitions may promote conflict.²⁷³²

One of the main criticisms towards regulatory networks is their lack of transparency and democratic accountability in comparison with national regulatory processes,²⁷³³ as they are seen as technocratic

²⁷²⁵ P.-H. Verdier, “Regulatory networks and their limits”, Harvard John M. Olin Center for Law, Economics, and Business Fellow’s Discussion Paper Series, Discussion Paper No. 22, 9/2008, 7-8, 57-58.

²⁷²⁶ A.-M. Slaughter, *A new world order*, Princeton, Princeton University Press, 2004, 24.

²⁷²⁷ P.-H. Verdier, “Regulatory networks and their limits”, Harvard John M. Olin Center for Law, Economics, and Business Fellow’s Discussion Paper Series, Discussion Paper No. 22, 9/2008, 17, 56, 61.

²⁷²⁸ M. Coppola, “One network’s effect: the rise and future of the ICN”, *Concurrences*, N° 3-2011, 222.

²⁷²⁹ A.-M. Slaughter, *A new world order*, Princeton, Princeton University Press, 2004, 28.

²⁷³⁰ P.-H. Verdier, “Regulatory networks and their limits”, Harvard John M. Olin Center for Law, Economics, and Business Fellow’s Discussion Paper Series, Discussion Paper No. 22, 9/2008, 6, 7, 55, 56.

²⁷³¹ Ibid., 56.

²⁷³² Ibid.

²⁷³³ Ibid., 59.

institutions not concerned with democracy.²⁷³⁴ It is therefore important that networks provide adequate access and influence to domestic constituencies.²⁷³⁵ At the same time, it can be said that networks are more accountable than classical supranational bodies, as they are composed of national officials, subject to the same accountability mechanisms that control national governments.²⁷³⁶ Accountability should not be seen in an abstract sense, but it should be considered to whom accountability is due. Domestic accountability will inevitably entail that regulators are strongly anchored to domestic demands, more than those of a ‘hypothetical global polity’, which has implications for the network in case both interests clash. Moreover, installing extensive accountability procedures inspired by domestic law is likely to hamper the informality, speed and flexibility that are said to be the main benefits of international regulatory networks. If networks are held accountable through domestic legal and political constraints, this will likely limit their contribution to global governance. If they have more domestic autonomy, the contribution to the enhancement of international enforcement and harmonization of standards will likely be more pronounced, but with the risk that this will reflect the self-interest of regulators (as a consequence of potential regulatory capture) rather than aggregate welfare.²⁷³⁷ Alternative methods are considered, such as deliberative participation and transparency, to reconceptualise legitimacy in transnational contexts.²⁷³⁸ PILOLA rightly emphasises that the focus should be on whether the decisions made by networks are made in the context of well-informed discourse, based on transparency, inclusiveness, and participation, rather than attempting to ensure that administrative agencies operate under explicit accountability mandates.²⁷³⁹

Finally, while it is said that network governance has the potential to depoliticize certain issues, politics still play a role, in particular as more distributive problems are tackled. Regulators, while taken out of their domestic setting, remain under the political oversight and the legal constraints valid in their home jurisdiction, and are therefore not entirely insulated from the domestic political pressures that hinder the negotiation of traditional international agreements. Domestic interests continue to determine the positions of individual national regulators when they engage in the network. Problems arise in particular when relatively easy to solve ‘coordination’ problems are supplemented with distributive and enforcement problems. The former conflicts involve issues where states share common objectives and there are multiple outcomes that all parties would favour over no agreement, but the parties prefer different solutions, while the latter regard situations where individual states can gain by defecting from the cooperative solution.²⁷⁴⁰ Networks generally avoid ambitious efforts “*at regulatory harmonization that would require sacrifice of short-term domestic interests and*

²⁷³⁴ A. Piilola, “Assessing theories of global governance: a case study of international antitrust regulation”, *Stanford Journal of International Law*, Vol. 39, 2003, 214. Also see K. Anderson, “Squaring the circle? Reconciling sovereignty and global governance through global government networks”, *Harvard Law Review*, Vol. 118, 2005, 1301.

²⁷³⁵ P.-H. Verdier, “Regulatory networks and their limits”, Harvard John M. Olin Center for Law, Economics, and Business Fellow’s Discussion Paper Series, Discussion Paper No. 22, 9/2008, 4.

²⁷³⁶ J. Fingleton, “Competition Agencies and Global Markets: The Challenges Ahead” in P. Lugard (ed.), *The International Competition Network at Ten – Origins, Accomplishments and Aspirations*, Mortsel, Intersentia, 2011, 192.

²⁷³⁷ P.-H. Verdier, “Regulatory networks and their limits”, Harvard John M. Olin Center for Law, Economics, and Business Fellow’s Discussion Paper Series, Discussion Paper No. 22, 9/2008, 9, 17, 59, 60.

²⁷³⁸ M. de Visser, “Network-based governance in EC law – the example of EC competition and EC communications law”, Hart Publishing, Oxford and Portland, Oregon, 2009, 393.

²⁷³⁹ A. Piilola, “Assessing theories of global governance: a case study of international antitrust regulation”, *Stanford Journal of International Law*, Vol. 39, 2003, 220.

²⁷⁴⁰ P.-H. Verdier, “Regulatory networks and their limits”, Harvard John M. Olin Center for Law, Economics, and Business Fellow’s Discussion Paper Series, Discussion Paper No. 22, 9/2008, 4-5, 12, 52.

*create enforcement problems they could not handle effectively.*²⁷⁴¹ According to VERDIER, the tensions between effective global governance, subsidiarity and democratic accountability are not resolved. He finds regulatory networks ill-equipped to address distributive and enforcement conflicts because a mutually acceptable outcome requires concessions and trade-offs across issue-areas, a political task that is often intertwined with manifestations of relative power, which is in contrast with the very nature of international regulatory networks. The fact that rules adopted by networks are generally nonbinding and not subject to monitoring, also limit their effectiveness in circumstances where states have incentives to defect. The ability of courts or politicians to override regulators and their network standards, based on domestic considerations, detract from the credibility of the commitments made in the network.²⁷⁴² In short, when looking at the four pillars of good regulatory governance developed by DAS and QUINTYN – independence, accountability, transparency, and integrity – networks present issues on all four accounts.²⁷⁴³

3. Intermediate conclusion Part III

The value of a ‘dedicated’ approach of bilateral agreements focusing solely on enforcement cooperation can only be fully determined when it is contrasted to an integrated approach. On a substantive level this relates to the inclusion of competition provisions in trade agreements. The trend towards more comprehensive competition provisions in FTAs implies that competition provisions in trade agreements are increasingly seen as fostering competition values and regimes *per se* and having intrinsic value, as opposed to mainly being seen as an instrument to off-set the harmful effects of anti-competitive practices on trade and being entirely subordinate to trade liberalization.²⁷⁴⁴

The link between trade and competition has always been present, but has gained in importance following the general evolution towards tackling so-called ‘behind-the-border’ issues in the liberalisation of trade. The failed attempt to include competition in the WTO-negotiations was the catalyst for the move towards competition provisions in bilateral FTAs. The Global Europe Communication signified the start of the EU’s new approach and its review of competition provisions in FTAs. Trade agreements were to become both deep and comprehensive. The ‘New EU Trade Policy’ built on the Global Europe agenda. EU FTAs can be categorised according to their primary motives, which can range from considerations relating to the EU’s membership and neighbourhood policy, to more strategic and commercially inspired considerations. A further distinction can be made between the ‘traditional’ EU FTAs, the newer ‘post Global Europe’ EU DCFTAs, and the recent ‘mega-FTAs’. An evolution can be witnessed towards an increased emphasis on substantive provisions rather than cooperation provisions, in line with the Global Europe strategy. Diversification has taken place, but simplification as well. In general, the scope of the competition provisions has broadened, but the content has not. There are limits to how much you can include in an FTA. There are no strong obligations and the competition chapter is generally excluded from the dispute settlement mechanism. This exclusion can be explained by several factors. A first reason is that this particular type of conflict-resolution is not suited to reach what the provisions aim to achieve. Creating a cooperative atmosphere, or symbolically indicating a dedication to create a competitive environment, do not benefit from hard dispute settlement. Moreover, the

²⁷⁴¹ Ibid., 58.

²⁷⁴² Ibid., 4, 18, 57.

²⁷⁴³ See A. Ottow, “Developing a Common Framework for Good Performances by Agencies” in P. Lugard (ed.), *The International Competition Network at Ten - Origins, Accomplishments and Aspirations*, Intersentia, Cambridge, 2011, 257-259.

²⁷⁴⁴ H. Tschaeni & V. Engammare, “The Relationship between Trade and Competition in Free Trade Agreements: Developments since the 1990s and Challenges”, *European Yearbook of International Economic Law*, Vol. 4, 2013, 57-58, 67.

provisions generally are *a priori* unenforceable when they represent best endeavour commitments. Finally, it is feared that dispute settlement employing panels of trade experts would impinge on the competence of competition authorities. The relatively young nature of competition law may also explain wariness towards hard adjudication.

The presence or absence of competition laws and enforcement institutions in the jurisdictions of the parties seems to be the main indicator of whether or not competition provisions are included in FTAs. The provisions may nevertheless fulfil several functions. The most straightforward reason to include them is to support trade enhancing objectives and to avoid the undermining of trade liberalisation via private restraints. Competition chapters may, however, also fulfil a symbolic role in promoting a pro-competitive reform and signifying adherence to a ‘competition culture’. The aim is then not to directly compel parties into removing private restraints on competition, but to indicate to both foreign investors and domestic constituents the commitment to open markets and pro-competitive reforms.²⁷⁴⁵ This is a role distinct from that of first and second generation cooperation agreements. While not the main aim of competition chapters in FTAs, they may also have the effect of facilitating relations between the competition authorities of the parties and promote voluntary cooperation. In this manner FTAs can serve as a catalyst. Competition chapters in FTAs may offer the possibility to even the path for future cooperation. However, their main contribution to international competition policy is that they provide a platform to demonstrate goodwill, and can establish certain basic principles and foundations underpinning the competition policies of the parties involved. Dedicated agreements can then further elaborate on practical enforcement cooperation. According to the OECD FTAs “*seem to stimulate a deeper level of integration and more intense cooperation on competition enforcement than bilateral agreements*”, but an UNCTAD study attenuated this statement by finding that FTAs often do not reach the originally envisaged level of cooperation.²⁷⁴⁶ Importantly, competition chapters in FTAs may circumvent deadlock in multilateral negotiations and set a precedent for further cooperation. It was confirmed that as the EU was not able to unblock the WTO-negotiations on competition from the inside, it attempts to do so from the outside via the inclusion of competition provisions in its bilateral FTAs. Certain oppositions seem to have disappeared in a bilateral context as compared to the multilateral negotiations. It is also possible that it is the international business community that presses for the inclusion of competition provisions in FTAs. As mentioned, this may have a reputational or branding effect about the importance of competition in a country’s economy which may provide incentives for investors. Regulatory chapters may also represent an export product from the dominant party. In this manner they are used as a vehicle for the approximation to the own domestic model and preferences. This is particularly the case for agreements concluded between the EU and ENP-partners, but not for commercially inspired agreements with more equal selected trade partners, which are often developed economies with established competition systems. More often than not there is no uniformity in the approach of the anti-competitive practices covered by the agreements and no true harmonization benefits are attained.²⁷⁴⁷ One of the most important roles of competition chapters in FTAs, however, is that they can promote and lock-in domestic reforms, by providing the international back-up to overcome domestic opposition. Apart from creating an international leverage to push reforms, domestic legitimacy of the competition policy in general may increase as well. Locking-in competition provisions in FTAs also ensures that successive governments may less easily depart from the policy

²⁷⁴⁵ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 198.

²⁷⁴⁶ OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 32.

²⁷⁴⁷ Ibid., 57–58, 67.

choices made in the agreement, creating a more predictable business environment. Domestic reform is particularly important as a 2006 paper commissioned by the OECD exposed that only 5% of FTAs were north-north agreements between developed countries.²⁷⁴⁸ More developing countries are therefore reached via FTAs rather than through bilateral enforcement cooperation agreements, which often exclude such countries. Finally, a genuine desire to safeguard market competition and a belief in the inherent value of competition law may explain the inclusion of competition provisions in FTAs.

The hypothetical nature of the above statements points to a lack of empirical evidence regarding the effect of competition chapters in FTAs. It is strongly encouraged that meticulous follow-up is made of the implementation of such chapters, in order to gain insight in the real effect of regulatory chapters dealing with behind-the-border measures. Detailed obligations to report should be standard provisions in FTAs. BOURGEOIS, DAWAR and EVENETT rightly claimed that “[u]nless and until the underlying research base improves, this implies that arguments based on anecdotal evidence, qualitative claims, and deductions made from first principles will have to bear the most weight in convincing the EC's trading partners of the merits of including certain provisions in future FTAs.”²⁷⁴⁹ Such follow-up is necessary, because many reasons exist to exercise caution when including competition chapters in FTAs. A first factor is that competition chapters may be reduced to just another pawn in the game of issue-trading that occurs in the negotiation of comprehensive FTAs, and fall victim to considerations relating to the larger political economy context rather than arguments inherent to the policy area. In this manner the chapter merely reflects the power-dynamics in the relations between the contracting parties and policy-making is neglected. When competition rules are imposed on a party that is not ready simply because it was part of a negotiation-package, this can be detrimental to international competition policy and law enforcement cooperation in general. Second, trade and competition, while related, are not the same. Priorities of trade negotiators and competition officials may differ to a large extent and this impacts the content of the agreement. Trade agreements are also far more subject to politicisation than competition cooperation agreements, in particular since the negotiation of ‘mega-FTAs’ led to an increase in political and social scrutiny, and more active involvement of interest groups. Finally, the issue of mixity renders the conclusion of comprehensive FTAs complex, and further increases the transactions costs. Delays or blockages may then also affect the competition chapters included in such agreements. The cost of including regulatory chapters in FTAs can indeed be high, to such an extent that ARAUJO asked whether “*persisting with many of the key regulatory issues may ultimately cost the EU the opportunity of concluding trade deals with important economic and geopolitical implications.*”²⁷⁵⁰ While competition provisions are generally not the most controversial element of such negotiations, the question can nevertheless be asked whether systemic problems attributed to preferential trade affect the competition provisions within trade agreements.²⁷⁵¹ Negotiations over the inclusion of competition chapters in FTAs should not take up too many resources from other

²⁷⁴⁸ O. Solano & A. Sennekamp, “Competition Provisions in Regional Trade Agreements”, OECD Trade Policy Working Paper Series, Paper No. 31, 2006, COM/DAF/TD(2005)3/FINAL. OECD, Policy Roundtables, Improving International Co-operation in Cartel investigations, DAF/COMP/GF(2012)16, 30 November 2012, 31.

²⁷⁴⁹ J. Bourgeois, K. Dawar & S. J. Evenett, “A comparative analysis of selected provisions in free trade agreements”, Commissioned by DG TRADE, October 2007, <http://www.kamaladawar.com/userfiles/file/downloads/A%20Comparative%20Analysis%20of%20Selected%20FTAs.pdf> (accessed February 2017), 207.

²⁷⁵⁰ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 239.

²⁷⁵¹ J. Rennie, “Competition regulation in SAFTA, AUSFTA and TAFTA: a spaghetti bowl of competition provisions?”, *International Trade Law & Regulation*, Vol. 13, No. 2, 2007, 30.

more pressing tasks that require staff from competition agencies, so that the value of their inclusion remains larger than the cost.²⁷⁵²

In sum, there are valid reasons to include competition chapters in FTAs, both for the benefit of competition policy and in the pursuit of trade objectives. While some have claimed that FTAs are ‘the natural venue’ to address competition issues, considering the lack of comprehensive multilateral rules in the WTO,²⁷⁵³ their integration in the general architecture of FTAs has nevertheless been a delicate issue. The fact that the institutional framework was not designed for such provisions can cause complications with regard to interpretation and enforcement. Many of the earlier FTAs were negotiated in the aftermath of the ultimately ill-fated proposal for a WTO multilateral framework on competition policy, which may have influenced the negotiations on the competition chapters.²⁷⁵⁴ The fact that the provisions are unenforceable is not a reason to discard them. As mentioned, the most important role of the provisions lies in their aspirational nature and the driver they may be for domestic reform.²⁷⁵⁵ While competition chapters in FTAs in this sense may contribute to the global spread of a competition culture, they do not, however, provide strong tools for international enforcement cooperation. TRITELL rightly claimed that the added value of FTAs is to be found in the creation or strengthening of consensus on key competition principles, such as a consumer welfare goal, transparency, non-discrimination, or procedural fairness, rather than in providing detailed cooperation or substantive provisions.²⁷⁵⁶ Moreover, competition chapters in FTAs do not anticipate regulatory inefficiency. One aspect that is simply not addressed are the inefficiencies associated with the administration of multiple competition laws, even though this may present a significant impediment for a business's commercial viability.²⁷⁵⁷

On a whole, it is unclear therefore what the grand strategy is behind the EU's inclusion of competition chapters in its FTAs.²⁷⁵⁸ It does not seem to be an extension of its earlier WTO agenda. As mentioned, in near-all recent cases, competition chapters are entirely excluded from the DSM. According to ARAUJO, however, this is not because the EU faced similar resistance in the negotiation of its competition chapters in bilateral FTAs as it did in the WTO. There is no proof of such resistance, EU negotiating drafts never indicated more ambitious goals, and the EU allegedly even rejected “*overtures from large trading partners, such as Canada, who are willing to negotiate more ambitious and enforceable rules on competition.*”²⁷⁵⁹ There seems to be a disconnect between the EU's narrative and its actual practice concerning DCFTAs. This leads ARAUJO to question the EU's commitment to link

²⁷⁵² D. D. Sokol, “Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements”, *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 235.

²⁷⁵³ H. Tschaeni & V. Engammare, “The Relationship between Trade and Competition in Free Trade Agreements: Developments since the 1990s and Challenges”, *European Yearbook of International Economic Law*, Vol. 4, 2013, 44, 67.

²⁷⁵⁴ S. J. Evenett, “What can we really learn from the competition provisions of regional trade agreements?”, 23 August 2005, available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.583.9612&rep=rep1&type=pdf> (accessed February 2017), 19.

²⁷⁵⁵ J. Drexler, W. S. Grimes, C. A. Jones, R. Peritz, E. T. Swaine (eds), *More common ground for international competition law?*, Cheltenham, Edward Elgar Publishing, 2011, 246.

²⁷⁵⁶ Interview with Randy Tritell (Director, Office of International Affairs, US FTC) by Gönenç Gürkaynak (Managing Partner, ELIG, Attorneys-at-Law) in view of their panel “Globalization and the Rise of Regionalism: TPP, ASEAN, COMESA, MINT and Coherence in the World”, Competition and Globalization in Developing Economies Conference, New York City, 28 October 2016.

²⁷⁵⁷ J. Rennie, “Competition regulation in SAFTA, AUSFTA and TAFTA: a spaghetti bowl of competition provisions?”, *International Trade Law & Regulation*, Vol. 13, No. 2, 2007, 37.

²⁷⁵⁸ Also see R. Ahearn, “Europe's Preferential Trade Agreements: Status, Content, and Implications”, CRS Report for Congress, 3 March 2011, summary.

²⁷⁵⁹ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 200.

competition and trade, as it divided the Commission from the start.²⁷⁶⁰ Competition officials worried that if competition would be included in the working sphere of trade experts, this would change focus from international competition and consumer welfare to market access and trader interests.²⁷⁶¹ ALVAREZ, CLARKE and SILVA explained the success of agency-to-agency agreements and MLATs through “*a lack of satisfaction among competition authority staff members about the trade focus of the provisions on competition included in [regional trade agreements]*”.²⁷⁶² While competition chapters have been more or less a constant in the EU’s FTAs, the EU does not seem to demonstrate great determination regarding its desired direction for such chapters. AHEARN moreover pointed to a lack of strategy on a larger scale, as he feared that the international regulatory competition caused by the EU and the US attempting to extend their rules and regulations via FTAs would form a threat to the multilateral trading system considering the lack of a grand scheme or blueprint.²⁷⁶³ It should be noted, however, that this threat is not so much present with regard to competition law as the provisions are generally too vague to create real conflict. If competition chapters in FTAs should become more developed, it is important however that this happens in a way that is consistent with multilateralism. Rather than promoting the domestic model and introducing new standards, enhanced compliance with existing international norms or standards should be pursued in order to avoid what former WTO Director-General MOORE described as an ‘*à la carte* approach’ to trade agreements in areas such as competition, leading to a ‘recipe for confusion’.²⁷⁶⁴ RENNIE claimed that it is the degree of generality that prevents incoherence between competition provisions as there is too little detail for fault lines to emerge between individual competition chapters.²⁷⁶⁵

It is clear in any event that competition chapters in FTAs serve a different purpose than dedicated competition cooperation agreements. They are not suited as main vehicles to create international cooperation among competition authorities. Cooperation provisions, if present, are largely subordinate to substantive requirements. Sometimes the countries with which an FTA is concluded lack experience with competition law and the substantive provisions serve the purpose of fine-tuning the competition law system. Intense enforcement cooperation is then premature. According to ARAUJO the lack of emphasis on inter-agency cooperation mechanisms may also be explained by the focus on trade or “*the absence of any real incentive for the EU to push for far-reaching cooperation commitments with developing countries.*”²⁷⁶⁶ Including cooperation provisions in an FTA may have the effect of serving as an impetus to increase cooperation informally between agencies, by lowering the threshold for inter-agency contact, but generally the agreement is not designed to do so. Specialized cooperation agreements may have a greater effect in this regard than the more general FTA provisions, but the transaction costs of such agreements must be taken into account.²⁷⁶⁷ SOKOL uses a bureaucratic

²⁷⁶⁰ Ibid.

²⁷⁶¹ I. Maher, “Competition law in the international domain: networks as a new form of governance”, *Journal of Law and Society*, Vol. 29, No. 1, March 2002, 126.

²⁷⁶² P. Brusick, A.-M. Alvarez & L. Cernat (eds), *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains*, United Nations Publication, 2005, 134.

²⁷⁶³ R. Ahearn, “Europe’s Preferential Trade Agreements: Status, Content, and Implications”, CRS Report for Congress, 3 March 2011, 29.

²⁷⁶⁴ S. Woolcock, “European Union policy towards Free Trade Agreements”, ECIPE Working paper no. 03/2007, 11; J. Rennie, “Competition regulation in SAFTA, AUSFTA and TAFTA: a spaghetti bowl of competition provisions?”, *International Trade Law & Regulation*, Vol. 13, No. 2, 2007, 33.

²⁷⁶⁵ J. Rennie, “Competition regulation in SAFTA, AUSFTA and TAFTA: a spaghetti bowl of competition provisions?”, *International Trade Law & Regulation*, Vol. 13, No. 2, 2007, 34-35.

²⁷⁶⁶ B.A. Melo Araujo, *The EU deep trade agenda – law and policy*, Oxford, Oxford University Press, 2016, 198-199.

²⁷⁶⁷ D. D. Sokol, “Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements”, *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, 274-275.

politics model to explain why the formalisation of agency level cooperation at a sub-state level between antitrust agencies leads to more action than competition chapters in FTAs. According to him “[s]uch agreements will tend to operate below the political radar, both in terms of inter-agency conflict over negotiating priorities and in terms of eliminating the need for legislative approval afterwards.”²⁷⁶⁸ Transaction costs are significantly reduced in this manner as third parties such as trade ministries are avoided.²⁷⁶⁹

The geographical component of the integrated approach regards the role of multilateralism. The impetus for this research came from the fact that the different bilateral instruments available to the European Commission did not seem to have equally clear diversified objectives as is the case on the multilateral scene. Multilateral forums gain in importance since the duopoly in competition law has evolved into an oligopoly. The roles of the different main forums are distinct, with the OECD mainly aiming at developed countries, the WTO focusing on trade, UNCTAD centring around developing country needs, and the ICN being a near-virtual competition-only forum. Each venue is faced with challenges for the future. The OECD should focus on solutions rather than merely mapping out the problems. The WTO is not a suitable venue for increased competition related activity, while UNCTAD should find a way to increase its role in a world with multiple power centres. Finally, the ICN, which currently is the main venue for work on international competition law enforcement cooperation, will have to deal with the limits of its virtual nature, and improve the implementation of its output. It will also need to continue to tackle more difficult problems if it wishes to remain relevant, and will have to encourage even more participation by smaller or developing economies.

Often the ECN is mentioned as a successful example of international cooperation. While not all its traits can be transposed to the international level, as it is a regional network based on a common basis of substantive law, an assumption of equivalence, and a certain amount of top-down steering by the Commission, some lessons can nevertheless be drawn. First, the value of a common legal framework becomes clear, as well as the importance of procedural convergence. The ECN also demonstrates that some form of hard obligations does not necessarily lead to a disturbance of domestic enforcement agendas, and that hard obligations do not necessarily require hard enforcement. It also demonstrates the drawbacks of informal communication. The ECN is indeed not without flaws itself. The fact that a common procedural framework is lacking cannot entirely be addressed via an assumption of equivalence. The Network also struggles with issues of transparency and accountability, and due process matters cause concern as well. When put to the test the Network-mechanisms were not put in motion.

The focus of multilateral forums is different than that of bilateral cooperation mechanisms, as they mainly work to stimulate convergence. The ‘tectonic plates’ of the dominant jurisdictions’ competition systems are slowly moving together, sometimes at an invisible pace. Multilateral forums also create momentum on a larger scale, and are in a better position to stimulate advocacy and ensure inclusiveness. Relating to the latter, they also provide for capacity building and technical assistance. Finally, they can ensure coherence among bilateral arrangements and across policy fields. The bilateral and the multilateral spheres should not exist independently, however. While the multilateral plane has a distinct role to play compared to bilateralism, it can also promote the latter. One way of doing so is that via convergence created on a multilateral level, bilateral cooperation can advance. What is not done to this day in the field of competition law, however, is active promotion of bilateral

²⁷⁶⁸ Ibid.

²⁷⁶⁹ Ibid.

cooperation in multilateral forums, for instance by creating more awareness about the benefits and achievements of such ties. A grand strategy concerning the role of bilateralism in the internationalisation of competition law is currently lacking. The different multilateral forums should also ensure that there is no overlap among themselves, and that synergies can be created. ‘Competing multilateralism’ should be avoided, so that scarce resources can be spent more efficiently. More cooperation should take place among the multilateral forums, and expertise should be exploited. This Part III opened with the quote “[t]he best practice in competition policy is the relentless pursuit of better practices.”²⁷⁷⁰ Multilateral forums offer the ideal venue to do so, but the same should be done with regard to their own functioning.

‘Network governance’, as occurs in the multilateral forums mentioned above, is often lauded as the new form of international order. Compared to more traditional forms of rule-making, networks are said to create efficiencies by increasing a state’s capacity to address transnational issues, and national interests can be redefined through engagement in a common enterprise. Finally, the technocratic nature of most networks allegedly depoliticises sensitive issues. Caution is in place, however, as this type of global governance is not without flaws. The critique is double. On the one hand networks are blamed for being an ineffective waste of resources and being mere talking shops, while on the other hand they are accused of enabling unchecked technocratic rule-making and allowing regulators to escape domestic constraints. Hard evidence for either accusation seems to be lacking, however. The main criticism towards regulatory networks is their lack of transparency and democratic accountability. While this is a valid concern, it must be remembered that networks would lose much of their added value if they were subject to the same accountability mechanisms as in the domestic sphere. Focus should be on well-informed, transparent, inclusive, and participatory decision-making, rather than explicit accountability mandates.

²⁷⁷⁰ W. E. Kovacic, “Achieving Better Practices in the Design of Competition Policy Institutions”, remarks before the Seoul Competition Forum, 20 April 2004.

Conclusion: ready, but not willing or able

*“The life of the law has not been logic, it has been experience.”*²⁷⁷¹

Globalisation has made international cooperation to enforce competition laws a necessity rather than a luxury. The cost of non-cooperation is high, and far higher than the cost of cooperation. There is not one optimal form of cooperation. However, the international community has rightly steered away of trying to establish a global code. While early initiatives may have been too ambitious for their time, such an endeavour would not be any easier today. The tremendous increase in competition laws and enforcers as well as differences in market economies do not simplify the task, and while the increase in trade levels and the interconnectedness of markets does serve as a catalyst, the will to cooperate has not increased significantly since the early days in which cooperation was discussed, as illustrated by the lukewarm commitments in bilateral agreements.²⁷⁷² While agreement on the underpinnings of competition policy has increased among the EU-US duopoly, new, important players do not generally find themselves in these views. Nations turned to extraterritorial application of national laws, and this has remained the default solution to date. MELAMED goes too far by saying that it would be a mistake to codify competition principles “*that may well be shown to be wrong, impractical, or outdated in a few years*” and “*either too vague to be useful or, if precise, unsuited to the disparate interests involved and unlikely to pass the test of time and experience.*”²⁷⁷³ Codification of general principles may help move everyone in the same direction. Nevertheless, a shift in preferences has occurred and case-specific cooperation has rightly come to the forefront. BRANDENBURGER was right when she said that getting cases right together would be the true test of how competition agencies can meaningfully participate in the global environment.²⁷⁷⁴ In the OECD discussion on international cooperation, the US rightly indicated a twofold challenge for international cooperation in competition matters. The first was to make more effective use of the existing mechanisms, recognizing the legal, cultural, political, and economic factors specific to individual jurisdictions, while the second was to reflect on a long-term approach of international cooperation.²⁷⁷⁵

Building on this twofold approach, eight suggestions are formulated based on the above analysis to fulfil the potential of bilateral cooperation agreements as a worthy tool in international cooperation in the field of competition law.

First and foremost, international cooperation instruments must evolve along the changing challenges posed to international law enforcement. The state of knowledge is always imperfect. Competition authorities must incessantly adapt to a fluid environment characterised by industrial dynamism and new transactional phenomena, and evolutions in relationships with peers.²⁷⁷⁶ In order to allow for this evolution, more follow-up is needed on the functioning of existing instruments. It is crucial that the

²⁷⁷¹ O. Holmes Jr., *The Common Law*, Boston, Little, Brown and Company, 1881.

²⁷⁷² M. Gal, “Review Essay: New Perspectives on International Antitrust”, *The American Journal of International Law*, Vol. 106, 2012, 404-406.

²⁷⁷³ A. Melamed, “International Cooperation in Competition Law and Policy: What can be Achieved at the Bilateral, Regional, and Multilateral levels”, *Journal of International Economic Law*, Vol. 2, No. 3, 1999, 433.

²⁷⁷⁴ R. Brandenburger, “Antitrust enforcement in a network culture: opportunities and challenges in the 21st century” in N. Charbit, E. Ramundo, A. Chehtova, & A. Slater (eds), *William E. Kovacic An Antitrust Tribute, Liber Amicorum – Volume I*, New York, Institute of Competition Law, 2012, 398.

²⁷⁷⁵ OECD, Discussion on International Co-operation, Contribution of the United States, DAF/COMP/WP3/WD(2012)24, 12 June 2012, 3.

²⁷⁷⁶ D. Sokol, “Cartels, corporate compliance, and what practitioners really think about enforcement”, *Antitrust Law Journal*, Vol. 78, No. 1, 2012, 217.

documentation of the implementation of cooperation agreements improves, in order to allow for the assessment of their functioning and in this manner increase the adaptability and flexibility of the cooperation mechanisms they contain. Detailed accounts of cooperation should be made, so that benchmarking reviews can take place. If cooperation does not lead to consistent remedies, the impact of the divergent remedies on the parties and competitive processes should be measured, and it should be retrospectively reviewed where cooperation could have been improved, what the underlying reasons for obstructions were and if and how the latter can be avoided in the future.²⁷⁷⁷ Evaluation of the adequacy of the existing legislative framework, the effectiveness of existing institutions, and the quality of substantive outcomes should be routine. Agencies do not seem to invest in engaging in a careful, confidential ex post-examination of instances of (failed, missed, or successful) cooperation. A side-by-side, behind-closed-doors deconstruction of cases would be a valuable way to unreservedly discuss alternative interpretations. Critical self-assessment should occur. Gathering more information on concrete instances of cooperation represents only a minimal investment and can serve as a valuable lesson for both the enforcers involved and the cooperative process in general. KOVACIC rightly claims that such reflection on past outcomes and practices is not a purely optional, luxury component of policy-making, but is a natural and necessary element of responsible public administration. The mock cases discussed during the ICN annual conference are often regarded as one of the most valuable aspects of the conference. Such interactions should take place in a bilateral context as well. More generally, statistics of international enforcement activity should also be more widely available. Well-maintained, comprehensive, informative, and public databases on international enforcement are currently lacking in the field of competition law.²⁷⁷⁸ By doing so more insight can be gathered on the causal relationship between formal cooperation under bilateral agreements or other international tools, and informal cooperation outside any framework.²⁷⁷⁹ A change should occur in the way in which communication on competition matters takes place. A study of US media coverage of cartel enforcement from 1990 to 2009 suggested that compared to other types of financial crimes, such as accounting fraud, successful enforcement has not created sufficient awareness of cartel behaviour among the public. Such apathy may in turn impact deterrence and detection.²⁷⁸⁰ It was rightly suggested by SOKOL that competition authorities should “sell the anti-cartel message to the public in terms of direct customer harm in the form of increased prices, rather than simply the amount of fines imposed on guilty cartel members.”²⁷⁸¹ Rather than investing resources in new elaborate arrangements or rules, the first investments should go to better follow-up of existing mechanisms and patterns, and increased and better communication.

Second, existing bilateral cooperation agreements should have flesh added to their bones. They should go beyond the multilateral guidelines that already exist and that are limited to guiding principles. While reference should be made to widely-accepted international soft law, the value of the latter should be increased by fleshing out such rules in a bilateral formal context. The technique of

²⁷⁷⁷ Also see D. Garza, J. Yarowsky, B. Burchfield, W. S. Cannon, D. Carlton, M. Delrahim, J. Jacobson, D. Kempf, Jr., S. Litvack, J. Shenefield, D. Valentine, J. Warden, *Antitrust Modernization Commission - Report and Recommendations*, April 2007, available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (accessed May 2015), 223-225; and S. Scott, “A Canadian Perspective on the Role of Comity in Competition Law Enforcement in a Globalised World”, *Competition Law International*, April 2011, 74.

²⁷⁷⁸ W.E. Kovacic, “Nine next steps for transatlantic antitrust policy cooperation”, *CPI Antitrust Chronicle*, Vol. 1, October 2011, 3, 7-8.

²⁷⁷⁹ ICN Roundtable on Enforcement Cooperation, Roundtable Report & Questionnaire Response Summary, Washington, DC, 29 March 2011, 5.

²⁷⁸⁰ D. D. Sokol, “Cartels, corporate compliance, and what practitioners really think about enforcement”, *Antitrust Law Journal*, Vol. 78, No. 1, 2012, 203.

²⁷⁸¹ *Ibid.*, 220.

‘studied ambiguity’,²⁷⁸² characteristic of traditional treaty-making, is not useful in the context of enforcement cooperation agreements. Opaque language should be avoided, in particular with regard to due process issues and in cases where the rights of defence and legal systems differ.²⁷⁸³ Imprecise law can be efficient in a high-trust environment with high consensus, but generally it should be limited and clear definitions are needed.²⁷⁸⁴ It must be entirely obvious what information can be disclosed, when it can be disclosed, to whom, and what use can be made of it. Rather than merely being permissive, bilateral cooperation agreements should incentivise. GRIFFIN rightly pointed out that “*assent to intentionally vague recommendations is not equivalent to a commitment to follow those recommendations in specific circumstances.*”²⁷⁸⁵ This is where bilateral agreements can come into play. Annexes form the ideal way to include positive examples of cooperation and additional practical guidance for competition agencies. They do not require a formal change of the agreement and therefore are flexible instruments. A list with examples of tangible coordination activities should be developed. Examples of such activities are the coordination of requests for documents so as not to impose different burdens on the parties, or the coordination of interviews of representatives or questionnaires to customers. It could be made explicit to what extent the parties can accommodate the fact that divergent national procedures impede the alignment of timing, time-tables and information exchanges as prerequisites for the close coordination of proceedings. Emphasis could be put on the extent to which procedural landmarks can be aligned while respecting the domestic legal framework, making a distinction between merger reviews and the pursuit of other anticompetitive practices. Also with regard to comity little more than the mere principle is currently mentioned in the agreement. Whether and how to apply the principle in practice remains vague.²⁷⁸⁶ In this manner the investigative process could be further streamlined and made more palpable without compromising the sovereignty of the respective regulators.²⁷⁸⁷ Barely any agreements mention specific examples of coordination arrangements.²⁷⁸⁸ If the exclusion of parallel procedures is not yet possible, their management should be so that a maximum of efficiencies can be achieved. Detailed guidance is required in this regard, and possible in a bilateral relationship.²⁷⁸⁹ In the 2012 OECD/ICN Joint Survey 36% of respondents (20 respondents) suggested structural solutions for limitations to the exchange of confidential information, of which 8 respondents specifically requested a more practical

²⁷⁸² M. Taylor, *International competition law – A new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 363.

²⁷⁸³ ICN, Cartels Working Group, Co-operation between Competition Agencies in Cartel Investigations, Report to the ICN Annual Conference, Moscow, May 2007, 28.

²⁷⁸⁴ College of Europe high-level conference, “The division of competences in the EU legal order – a post-lisbon assessment”, 20-21 April 2016, Verversdijk, Brugge.

²⁷⁸⁵ J. P. Griffin, EC/U.S. antitrust cooperation agreement: impact on transnational business”, *Law & Policy in International Business*, Vol. 24, 1992-1993, 1051.

²⁷⁸⁶ M. Albers, “National Competition Laws, International Cooperation and Procedural Rights” paper for Cauffman, Caroline, Hao, Qian (eds), *Procedural Rights in Competition Law in the EU and China*, China-EU Law Series, Vol 3., Berlin, Heidelberg, Springer, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567001 (accessed July 2017), 15.

²⁷⁸⁷ Concurrences and George Washington University Law School Conference, “120 Merger Regimes: Multinational deals in a world of non-convergence: US, EU, Brazil, China,... - A call for Harmonization: towards regional regulators or comity?”, Washington DC, 19 September 2016, Interview of Michael Ray (Chief Legal Officer, Western Digital) by David Gelfand (partner, Cleary Gottlieb).

²⁷⁸⁸ The 1999 EU-Canada Agreement does refer to agreeing on the timing of the activities and the 2013 EU-Switzerland Agreement on the timing of inspections.

²⁷⁸⁹ See D. Garza, J. Yarowsky, B. Burchfield, W. S. Cannon, D. Carlton, M. Delrahim, J. Jacobson, D. Kempf, Jr., S. Litvack, J. Shenefield, D. Valentine, J. Warden, *Antitrust Modernization Commission - Report and Recommendations*, April 2007, available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (accessed May 2015), 223.

protocol for exchange of information, for example regarding timing of procedures.²⁷⁹⁰ More fleshed out agreements provide additional transparency, and may give confidence to the business community that cooperation is conducted according to an established and clear set of protocols.²⁷⁹¹ When there is confidence in the process, disagreements about the outcome are easier to digest.²⁷⁹² Enforcement cooperation agreements are generally seen as a tool only available to experienced competition agencies. More detailed agreements, however, could be instrumental for younger competition agencies as well, as they provide insight on how advanced jurisdictions interact.

Third, with regard to the form of the agreements rather than their content, the value of formality has been underlined. Formal, binding agreements provide stability and transparency. While MoUs suffice at the moment for the conclusion of first generation agreement, it is regrettable that the Court did not offer more guidance in case C-660/13 *Council v Commission* and leaves open the question to what extent the institutions might have recourse to the technique of legislative delegation in order to safeguard the effectiveness of EU external action. The rather burdensome procedure of Article 218 TFEU is unsuited for the conclusion of predominantly technical agreements, which do not require heavy political investment. As cooperation evolves, the Commission might feel the need to conclude MoUs on behalf of the Union rather than merely itself. Allowing a certain extent of delegation would then be more in line with the needs of international enforcement cooperation. Inspiration can moreover be taken from cooperation in other policy fields to experiment with bilateralism. Bilateralism and multilateralism should feed off each other (see below). Very little experimentation has taken place with the concept of opt-ins for instance. Bilateral agreements can evolve to trilateral or plurilateral agreements, as happened for instance with the cooperation agreement between the competition authorities of Canada, New Zealand and Australia.²⁷⁹³ Rather than pursuing the unrealistic step towards a global agreement, an evolution towards several plurilateral agreements seems more likely.²⁷⁹⁴

Once the opt-in has been made, however, stronger commitments should be made than is currently done in bilateral agreements. The fourth suggestion is therefore that ‘cooperation discipline’ should be established. This does not imply that competition authorities should be obliged to cooperate, but the discretion of the authorities should be restricted to a certain extent, for instance via an obligation to motivate a refusal to cooperate or to limit the legitimate reasons to do so. If resources are spent negotiating bilateral agreements, the added value should be more than just a symbolic commitment to closer cooperation. Cooperation should not be forced, but best endeavour commitments should be worded more strongly. The 1999 EU-Canada Agreement is exemplary in this regard to a certain extent, as for instance it requires that the parties “*seek to maximise the likelihood that the other party’s enforcement objectives will also be achieved*” and requires that the requested party inform the requesting party not only of its decision but also of the reasons for that decision.²⁷⁹⁵ If the effort is made to

²⁷⁹⁰ OECD, Report on the OECD/ICN Survey on International Enforcement Co-operation, DAF/COMP/WP3(2013)2, 26 February 2013, 116.

²⁷⁹¹ OECD, Global forum on Competition, Improving international co-operation in cartel investigations, Contribution from BIAC, DAF/COMP/GF/WD(2012)57, 13 February 2012, 3.

²⁷⁹² T. L. Banks, “Bill Kovacic and the global evolution of antitrust” in N. Charbit, E. Ramundo, A. Chehtova, & A. Slater (eds), *William E. Kovacic An Antitrust Tribute, Liber Amicorum – Volume I*, New York, Institute of Competition Law, 2012, 106.

²⁷⁹³ M. Taylor, *International competition law: a new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 141.

²⁷⁹⁴ “Crossing Merger Control Frontiers: What are the new borders?”, 3rd Annual conference organized by Concurrences and Paul Hastings, Paris, 30 October 2015.

²⁷⁹⁵ Article IV(3)(b) and V(3) EU-Canada Agreement. See OECD, Inventory of co-operation agreements, Note by the secretariat, DAF/COMP/WP3(2015)12/REV1, 20 November 2015, 21, 26.

negotiate a second generation agreement, investigatory assistance should be included, and information exchange should be made as broad as possible without impinging on the fundamental rights of the parties involved. In this regard a reconsideration of the balancing act reflected in the current safeguards is in order.

In the fifth place, and in line with the fourth suggestion, more ambition is needed when cooperating internationally. Intense advocacy on the benefits of cooperation, not only towards the public, but also towards governments, is required to elicit such ambition. Willingness should be developed at the multilateral level, where nations should be made aware not only of the benefits of cooperation, but also the cost of non-cooperation. Political barriers can be broken down with the aid of technical cooperation instruments. The current lack of discipline in cooperation agreements is linked to a lack of ambition. Not only is a stronger commitment needed, but the scope of the agreements should be broadened as well. Enforcement cooperation mainly occurs amongst a select group of developed competition authorities, those authorities should be the fore-runners in exploring novel ways of cooperation.²⁷⁹⁶ Rather than being limited to tentative provisions on information exchange, cooperation agreements should dare to incorporate new cooperation techniques, and as mentioned, serve as an incentive to cooperate rather than a mere permissive vehicle. Interaction with other mechanisms should be increased. For instance, a commitment to the promotion of waivers could be included. Commitments to personnel-exchanges could be included in the agreement. Experience with cross-appointments in the ACCC and the New Zealand Commerce Commission (NZCC) demonstrated that such exchanges help strengthen co-operation, help align the respective analysis on cases, and increase the sharing of knowledge, experience and expertise.²⁷⁹⁷ Even if choice of law-rules and substantive harmonization are unattainable, the alternative is not merely the status quo of information sharing.²⁷⁹⁸ Even transfer payments could be considered, to entice nations to undertake enforcement action contrary to their national self-interest.²⁷⁹⁹ GERBER pitched the concept of a ‘commitment pathway’, in which states commit to a process, a shared pathway, a set of short-term and long-term goals together with a set of implementing strategies and plans, rather than to accept a particular set of rules.²⁸⁰⁰ Long-term strategic considerations have to be taken into account.²⁸⁰¹

Sixth, cooperation among enforcers and regulators is restricted in its potential if those efforts are not taken into consideration in court. More attention should therefore go to the training of the judiciary and the creation of awareness among lawyers, who should get acquainted with cooperation agreements so that they can rely upon them. The discussion surrounding comity considerations

²⁷⁹⁶ “Of the 51 authorities responding to a survey, only 25 engaged in cooperation and only 13 did so regularly, i.e. in more than 5 cases annually.” M. Albers, “National Competition Laws, International Cooperation and Procedural Rights” paper for Cauffman, Caroline, Hao, Qian (eds), *Procedural Rights in Competition Law in the EU and China*, China-EU Law Series, Vol 3., Berlin, Heidelberg, Springer, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567001 (accessed July 2017), 9. Data taken from: OECD, “Challenges of International Co-operation in Competition Law Enforcement”, 2014, available at <http://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf> (accessed January 2015), 10-11.

²⁷⁹⁷ OECD, Report/Inventory on provisions contained in existing international co-operation agreements, Note by the Secretariat, DAF/COMP/WP3(2014)10, 16 December 2014, 24.

²⁷⁹⁸ Contrary to the opinion of GUZMAN. A. Guzman, “International competition law” in A. Guzman & A. Sykes (eds), *Research Handbook in International Economic Law*, Cheltenham, Edward Elgar Publishing, 2007, 437.

²⁷⁹⁹ M. Taylor, *International Competition Law: a new dimension for the WTO?*, Cambridge, Cambridge University Press, 2006, 121-122.

²⁸⁰⁰ D. Gerber, *Global Competition: Law, Markets, and Globalization*, New York, Oxford University Press, 2010, 10.

²⁸⁰¹ P. Lowe, “International Cooperation between Competition Agencies: Achievements and Challenges”, 4th Seoul International Competition Forum, 5 September 2006, 5.

illustrated that while competition authorities may be more and more receptive towards each other's reasoning, courts do not consistently do so. The complete absence of the cooperation agreements in the amicus curiae letters of intervening parties or in the reasoning of the court is testimony of the separation between the two spheres. More efforts should be made to complement enforcer cooperation by engaging the judiciary, for instance via trainings, the recognition of foreign judgments, and a mutual commitment for instance to collect fines and implement remedies on behalf of partner countries.²⁸⁰² Even though confidentiality disputes are rarely appealed to courts and therefore judicial review of confidentiality disputes during an investigation does not occur frequently,²⁸⁰³ courts can nevertheless play a large role in international competition law enforcement. Their involvement is crucial. More attention should go to communication between regulators, the executive, and the judiciary with regard to international cooperation.

A cautious approach is advised with regard to competition chapters in FTAs. Such chapters are valuable, and can fulfil many roles that are complementary to that of bilateral cooperation agreements. Again, more empirical follow-up is required of the actual effects, however. The most important benefits of competition chapters in FTAs relate to their reach, with FTAs being concluded with a broader range of countries, including developing countries, than those involved in bilateral cooperation agreements, and in the fact that despite the unenforceability of the provisions they can promote and lock-in domestic reforms. Developing countries often do not have the resources, information, or power to negotiate bilateral cooperation agreements, or are simply not a suited partner, because the substantive rules most suitable for them are often different from the rules most suitable for developed economies with. Including competition chapters in free trade agreements is therefore a first step in the development of the domestic competition regimes via a transfer of knowledge and knowhow useful to their own contexts.²⁸⁰⁴ There are nevertheless many drawbacks to including competition chapters in FTAs. Competition and trade are different policy areas with different goals. When negotiating a trade agreement, trade officials may therefore have different strategies in mind than competition officials, and competition chapters may be instrumentalised to attain non-competition related objectives. The difficulties associated with the negotiation of comprehensive trade agreements such as issues of mixity and politicisation moreover also affect the competition provisions within. The seventh suggestion is therefore that the EU should reflect on the direction it wishes to go in with regard to competition chapters in FTAs. They can be instrumental in a manner that bilateral cooperation agreements are not, but the inherent risks should not be ignored. This study puts forward that competition chapters should be included, but competition officials should ensure that their interpretation and application happens in a manner consistent with competition objectives and not just trade objectives.

Finally, international cooperation in the field of competition law and policy is in need of a comprehensive strategy. More interplay is needed, first, at the multilateral level. Each forum has its own strengths and specificities, but is also faced with its own challenges. Cooperation among the

²⁸⁰² B. Sweeney, "International Competition Law and Policy: A Work in Progress", *Melbourne Journal of International Law*, Vol. 10, 2009, 60-62. M. Albers, "National Competition Laws, International Cooperation and Procedural Rights" paper for Cauffman, Caroline, Hao, Qian (eds), *Procedural Rights in Competition Law in the EU and China*, China-EU Law Series, Vol 3., Berlin, Heidelberg, Springer, 2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567001 (accessed July 2017), 20.

²⁸⁰³ ICN, Agency Effectiveness Project on Investigative Process – Competition Agency Confidentiality Practices, April 2014, 11.

²⁸⁰⁴ E. Fox, "Antitrust without borders: from roots to codes to networks", E15 Expert Group on Competition Policy and the Trade System Think Piece, November 2015, 7-8.

multilateral forums is therefore required. Second, the interplay between the multilateral and bilateral level should improve. Examples of a more aware handling of those two spheres can be found in the area of international tax cooperation. Different goals can be achieved via the multilateral and bilateral track, and they rightly have a different focus. Bilateralism should not, however, be treated stepmotherly, but should be actively engaged. A first step in this process is education about the benefits of effective international cooperation. The multilateral forums will have to address the challenges inherent to forms of network governance, but in particular the issue of inclusion and participation in a world that is no longer governed by only a few powerful players. A multitude of active enforcers needs to be taken into account, with increasing attention for developing countries. The new forces of globalization must be considered and the diversity of economic and political needs must be recognized. In this manner goals, methods, expectations and obstacles different from those encountered in the US and the EU would be revealed.²⁸⁰⁵ In developing international (soft) standards, developing country needs must be taken into account, in particular if developing countries do not have the expert staffs and advisors to successfully develop and advocate the standards that are best for them at an international level. A dual-track alternative could be a way to accommodate their needs.²⁸⁰⁶

According to SANCHEZ, BAKKER and KLEIJWEG, “[i]nter-institutional cooperation has developed from being a byproduct of agency diplomacy to a central enforcement strategy.”²⁸⁰⁷ Cooperation, despite its advances, has nevertheless remained superficial. Nations are *ready* to cooperate, in the sense that they own the right capabilities as a state and as a competition agency to engage in effective international competition law enforcement, and have the tools available to them to do so.²⁸⁰⁸ However, they are not entirely *able* to do so yet, because of the flaws in the existing instruments available to them. These flaws exist, in essence, because of a lack of *willingness*. The fact that the protection of competition is in the universal interest of the international community and not merely in the interest of the state has not penetrated the rationale of international negotiations.²⁸⁰⁹ Competition law has its specificities compared to other policy areas, but it is not inherently immune to an international approach. This study has proven that while the EU’s bilateral instruments are in need of an update, they are worthy instruments to tackle some of the main problems that plague international competition law enforcement and are more than an interim-solution. Their potential can be realised following the reforms suggested in this study, and increased attention and strategy-making at a global level. Bilateral cooperation agreements can serve as adaptable testing grounds, and filter out successful approaches. Better practices will not develop when simply waiting for a global regime to emerge. If the life of the law is experience rather than logic,²⁸¹⁰ ambitious bilateral competition cooperation agreements can cultivate that experience and advance the global competition law enforcement system as a whole.

²⁸⁰⁵ D. Gerber, “The age of antitrust law globalisation”, *Concurrences*, N° 4-2010, 10-11.

²⁸⁰⁶ E. Fox, “Antitrust without borders: from roots to codes to networks”, E15 Expert Group on Competition Policy and the Trade System Think Piece, November 2015, 7-8.

²⁸⁰⁷ P. Amador Sanchez, G. Bakker, A. Kleijweg, “The art of enforcement: Cooperation with other institutions, a national competition authority’s perspective” in H. Don, J. de Keijzer, E. Lamboo, M. van Oers, J. van Sinderen (eds), *The Art of Supervision, Liber Amicorum, Pieter Kalbfleisch*, Rotterdam, Editor Ronald Kouwenhoven, 2011, 39.

²⁸⁰⁸ In this study the terms ‘competition authority’, ‘competition agency’, ‘antitrust authority’, and ‘antitrust agency’ will be used interchangeably.

²⁸⁰⁹ J. Basedow, “Competition Policy in a Globalized Economy: from Extraterritorial Application to Harmonization” in M. Neumann & J. Weigand (eds), *The International Handbook of Competition*, Cheltenham, Edward Elgar Publishing, 2004, 331.

²⁸¹⁰ O. Holmes Jr., *The Common Law*, Boston, Little, Brown and Company, 1881.

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ANNEX I SURVEY

Cover letter: Law Firm Experience with International Competition Law Enforcement

Dear Madam/Sir,

May I kindly ask for your crucial collaboration in the framework of my PhD-research on international competition law enforcement. It should take up only very little of your time. Confidentiality is guaranteed. A copy of the results can be provided.

Companies and the law firms that represent them (such as your own) are among the ones affected most by international competition cooperation agreements (think e.g. of the procedural burden in multijurisdictional merger filings), but little information is available in literature or official documents on how you experience such cooperation efforts. It is therefore essential to get your input, as past attempts (for instance by the ICN) have been unsuccessful. May I kindly ask you to take part in this survey or spread it in your law firm to those who you consider suitable to take part. The questions relate to your daily practice with regard to international mergers, international cartels, and international unilateral conduct cases. Some of the questions are more general in nature and would require a clear overview of the cases dealt with by the law firm. Please note that I do not require case details or any form of confidential information.

The selection of contacted law firms is based on their qualification in the Legal 500, and within each firm the partners with expertise in competition law that are (partially) based in the Brussels office are contacted.

May I kindly ask you to return the completed surveys at the latest by April 30th 2014. If you have any further questions or remarks, please feel free to contact me via e-mail on valerie.demedts@ugent.be or by telephone on xxxxxxxxxx. In case you are interested, you can also find me on LinkedIn.

For your information, I am a University of Ghent and College of Europe alumna currently pursuing a PhD on international competition law enforcement at the Ghent European Law Institute (Jean Monnet Centre of Excellence) of Ghent University, Belgium, under the supervision of professor Inge Govaere. For more information on my research I refer to the 1 page fact sheet that is attached to the survey.

Appreciatively looking forward to hearing from you,

Valerie Demedts
PhD researcher University of Ghent

11 March 2014

FACT SHEET PHD VALERIE DEMEDTS - GHENT UNIVERSITY

Author: Valerie Demedts (Ghent University, College of Europe Bruges)

Institution: Ghent University – Independent academic research

Guidance committee: Supervisor: Prof. Dr. Inge Govaere (Head of Ghent European Law Institute at Ghent University, Director of the European Legal Studies Department at the College of Europe, Bruges). Other members: Prof. Dr. Jacques Bourgeois and Prof. Dr. Philip Marsden.

Title of PhD thesis: The EU's dedication to its dedicated competition agreements – A qualitative legal and practical assessment of the EU's first and second generation competition cooperation agreements

Main research questions:

Should the EU continue to use dedicated competition agreements of the 1st and 2nd generation? Why? In other words, how effective are they and what is their potential?

In order to answer this question I will analyse:

PART 1: the background, context and evolution of international competition cooperation.

PART 2: the main benefits and flaws of first and second generation agreements:

In theory → the legal instrument / In practice → the implementation

PART 3: relation with free trade agreements / multilateral agreements

Main Research Subjects:

the EU-US first generation agreement of 95 (first 1st generation agreement of the EU)

The US-Australia second generation agreement of 98 (first 2nd generation agreement – US model)

The EU-Switzerland agreement of 2013 (first 2nd generation agreement – EU model)

EU-Ukraine DCFTA (first deep and comprehensive free trade agreement of the EU)

Aim: the aim is to inform rule-makers on how competition authorities can further improve their cooperation processes and remain at the forefront of international competition law enforcement by combining a theoretical academic approach with insights 'from the field' (via the use of interviews and surveys) of both enforcers and law firms defending international clients.

Reasons for qualitative research (interviews & surveys): The reason I wish to engage in qualitative research is that I want to analyse how different types of professionals experience the usefulness of competition cooperation agreements. I wish to investigate how the text of the law translates in practice. I want to learn how the officials of competition agencies interact with their international counterparts on a day-to-day basis and how particular legal instruments facilitate or obstruct this. I want to see how the companies subject to competition law enforcement and more specifically the law firms defending their interests benefit or suffer from such cooperation. Based on this data-set it is my aim to suggest improvements to the current legal system.

YOUR BENEFIT: A free summary report if interested. The chance to get your view across. My endless gratitude.

PhD survey V. Demedts: Law Firm Experience with International Competition Law Enforcement

Some questions are factual, others ask for an appreciation. Each respondent can decide for himself/herself the level of detail given in the reply, taking into account any issues of confidentiality. Nevertheless, I would ask for as complete an input as possible to maximise the relevance of the research. Feel free to add own remarks. In order to make this survey

as accessible as possible, it suffices to just complete in typing or writing this Word-document and return it to valerie.demedts@ugent.be

1. Mergers (if this is not your field of expertise, skip to section 2, starting at question 16)

Numerical data

1. What percentage of the *total* of merger cases that your law firm has dealt with were international in nature (i.e. covered more than one jurisdiction)?

- ☐ 0%
- ☐ 1 – 20%
- ☐ 21 – 40%
- ☐ 41 – 60%
- ☐ 61 – 80%
- ☐ 81 – 100%
- ☐ I can give a more exact estimate:
- ☐ I don't know

2. What percentage of the *total* of merger cases that you personally have dealt with were international in nature (i.e. covered more than one jurisdiction)?

- ☐ 0%
- ☐ 1 – 20%
- ☐ 21 – 40%
- ☐ 41 – 60%
- ☐ 61 – 80%
- ☐ 81 – 100%
- ☐ I can give a more exact estimate:

3. What percentage of the *international* merger cases dealt with by your law firm concerned a merger between an EU member state and a third country/ third countries (i.e. non-member state)?

- ☐ 0%
- ☐ 1 – 20%
- ☐ 21 – 40%
- ☐ 41 – 60%
- ☐ 61 – 80%
- ☐ 81 – 100%
- ☐ I can give a more exact estimate:
- ☐ I don't know

4. What percentage of the *international* merger cases you personally have dealt with concerned a merger between an EU member state and a third country/ third countries (i.e. non-member state)?

- ☐ 0%
- ☐ 1 – 20%
- ☐ 21 – 40%
- ☐ 41 – 60%
- ☐ 61 – 80%
- ☐ 81 – 100%
- ☐ I can give a more exact estimate:

5. On average, in the international merger cases you have dealt with, how many jurisdictions are involved?

Answer:

6. Do you cooperate with law firms from other jurisdictions hired by your client in a particular case?

- ☐ (almost) Never
- ☐ Rarely
- ☐ Sometimes
- ☐ Often
- ☐ (almost) Always

Obstacles

7. On average, would you consider the procedural burden – e.g. differing filing forms, differing deadlines, different information required - in the latter type of cases (EU-member(s) merge with non-member(s)):

- ☐ Very high
- ☐ High
- ☐ Reasonable
- ☐ Low
- ☐ Very low

8. What would you consider the biggest impediment to efficiently dealing with multi-jurisdictional mergers?

Answer:

9. Did the procedural burden of multijurisdictional mergers decrease over the years or did it increase? Why is that in your opinion?

Answer:

10. In your daily practice, do you notice the efforts that are being made by the European Commission in cooperating with third countries through for instance the development of joint filing forms or coordinated deadlines? Could you elaborate on this?

Answer:

Confidential information - Waivers

11. In what percentage of cases are (partial or complete) waivers of confidentiality provided by the parties?

- ☐ 0%
- ☐ 1 – 20%
- ☐ 21 – 40%
- ☐ 41 – 60%
- ☐ 61 – 80%
- ☐ 81 – 100%
- ☐ I can give a more exact estimate:

12. Do you think the waiver-system is working well? How do you think it could be improved in merger cases?

Answer:

13. To what extent do your clients worry that sensitive or confidential information will be disclosed?

Answer:

14. How would you define confidential information?

Answer:

Future

15. On what should the European Commission focus its future efforts with regard to international mergers (in particular mergers involving non-EU member states)?

Answer:

2. Cartel Cases (if this is not your field of expertise, skip to section 3, starting at question 36)

Numerical data

16. What percentage of the *total* of cartel cases that your law firm has dealt with were international in nature (i.e. covered more than one jurisdiction)?

- ☐ 0%
- ☐ 1 – 20%
- ☐ 21 – 40%
- ☐ 41 – 60%
- ☐ 61 – 80%
- ☐ 81 – 100%
- ☐ I can give a more exact estimate:
- ☐ I don't know

17. Which percentage of the *total* of cartel cases that you personally have dealt with were international in nature (i.e. covered more than one jurisdiction)?

- ☐ 0%
- ☐ 1 – 20%
- ☐ 21 – 40%
- ☐ 41 – 60%
- ☐ 61 – 80%
- ☐ 81 – 100%
- ☐ I can give a more exact estimate:

18. What percentage of the *international* cartel cases dealt with by your law firm concerned a cartel between an EU member state and a third country/ third countries (i.e. non-member state)?

- ☐ 0%
- ☐ 1 – 20%
- ☐ 21 – 40%
- ☐ 41 – 60%
- ☐ 61 – 80%
- ☐ 81 – 100%
- ☐ I can give a more exact estimate:
- ☐ I don't know

19. What percentage of the *international* cartel cases you personally dealt with concerned a cartel between an EU member state and a third country/ third countries (i.e. non-member state)?

- ☐ 0%
- ☐ 1 – 20%
- ☐ 21 – 40%
- ☐ 41 – 60%
- ☐ 61 – 80%
- ☐ 81 – 100%
- ☐ I can give a more exact estimate:

20. Do you cooperate with law firms from other jurisdictions hired by your client in a particular case?

- ☐ (almost) Never
- ☐ Rarely
- ☐ Sometimes
- ☐ Often
- ☐ (almost) Always

Obstacles

21. What would you consider the biggest impediment to efficiently dealing with multi-jurisdictional cartel cases?

Answer:

22. Did the procedural burden of multijurisdictional cartel cases decrease over the years or did it increase? Why is that in your opinion?

Answer:

23. Do you notice international cooperation taking place between the European Commission and third country competition authorities? E.g. coordinated dawn raids, exchange of information,...

Answer:

Private enforcement

24. How much does private enforcement of cartel cases occur in your experience?

- ☐ Almost never
- ☐ Occasionally
- ☐ Sometimes
- ☐ Often
- ☐ I don't know

25. Can you notice an increase in private enforcement of cartel cases over the last few years?

Answer:

26. What would you consider the biggest obstacles to successful private enforcement of cartel cases?

Answer:

Confidential information – waivers

27. To what extent do clients worry that sensitive or confidential information will be disclosed?

Answer:

28. In what percentage of cases are (partial or complete) waivers of confidentiality provided by the parties?

- ☐ 0%
- ☐ 1 – 20%
- ☐ 21 – 40%
- ☐ 41 – 60%
- ☐ 61 – 80%
- ☐ 81 – 100%
- ☐ I can give a more exact estimate:

29. Do you think the waiver-system is working well? How do you think it could be improved in cartel cases?

Answer:

30. How would you define confidential information?

Answer:

Leniency

31. What factors do you take into account when applying for leniency, especially when multiple jurisdictions are at stake?

Answer:

32. How do you think the leniency system could be improved?

Answer:

33. Should international coordination between leniency programmes be a priority on the international agenda?

Answer:

34. Do you agree with the following statement? Why? “There are some hurdles [to filing multiple leniency applications], but the hurdles are the price to pay to be granted immunity both on administrative sanctions and criminal sanctions and maybe jail time.”

Answer:

Future

35. On what should the European Commission focus its future efforts with regard to the fight against international cartels (in particular cartels involving non-EU member states)?

Answer:

3. Unilateral Conduct (dominance) (if this is not your field of expertise, skip to section 4, starting at question 51)

Numerical data

36. What percentage of the *total* of unilateral conduct cases that your law firm has dealt with were international in nature (i.e. covered more than one jurisdiction)?

- ☐ 0%
- ☐ 1 – 20%
- ☐ 21 – 40%
- ☐ 41 – 60%
- ☐ 61 – 80%
- ☐ 81 – 100%
- ☐ I can give a more exact estimate:
- ☐ I don't know

37. Which percentage of the *total* of unilateral conduct cases that you personally have dealt with were international in nature (i.e. covered more than one jurisdiction)?

- ☐ 0%
- ☐ 1 – 20%
- ☐ 21 – 40%
- ☐ 41 – 60%
- ☐ 61 – 80%
- ☐ 81 – 100%
- ☐ I can give a more exact estimate:

38. What percentage of the *international* unilateral conduct cases dealt with by your law firm concerned unilateral conduct between an EU member state and a third country/ third countries (i.e. non-member state)?

- ☐ 0%
- ☐ 1 – 20%

- ☐ 21 – 40%
- ☐ 41 – 60%
- ☐ 61 – 80%
- ☐ 81 – 100%
- ☐ I can give a more exact estimate:
- ☐ I don't know

39. What percentage of the *international* unilateral conduct cases dealt with by you personally concerned unilateral conduct affecting an EU member state and a third country/ third countries (i.e. non-member state)?

- ☐ 0%
- ☐ 1 – 20%
- ☐ 21 – 40%
- ☐ 41 – 60%
- ☐ 61 – 80%
- ☐ 81 – 100%

40. Do you cooperate with law firms from other jurisdictions hired by your client in a particular case?

- ☐ (almost) Never
- ☐ Rarely
- ☐ Sometimes
- ☐ Often
- ☐ (almost) Always

Obstacles

41. What would you consider the biggest impediment to efficiently dealing with multi-jurisdictional unilateral conduct cases?

Answer:

42. Did the procedural burden of multijurisdictional unilateral conduct cases decrease over the years or did it increase? Why is that in your opinion?

Answer:

43. Do you notice international cooperation taking place between the European Commission and third country competition authorities? E.g. coordinated dawn raids, exchange of information,...

Answer:

Private enforcement

44. How much does private enforcement of unilateral conduct cases occur in your experience?

- ☐ Almost never
- ☐ Occasionally
- ☐ Sometimes
- ☐ Often
- ☐ No idea

45. Can you notice an increase in private enforcement of unilateral conduct cases in recent years?

Answer:

46. What would you consider the biggest obstacles to successful private enforcement of unilateral conduct cases?

Answer:

Confidential information – waivers

47. In what percentage of cases are (partial or complete) waivers of confidentiality provided by the parties?

- ☐ 0%
- ☐ 1 – 20%

- ☐ 21 – 40%
- ☐ 41 – 60%
- ☐ 61 – 80%
- ☐ 81 – 100%
- ☐ I can give a more exact estimate:

48. To what extent do your clients worry that sensitive or confidential information will be disclosed?

Answer:

49. How would you define confidential information?

Answer:

Future

50. On what should the European Commission focus its future efforts with regard to the fight against international unilateral conduct cases?

Answer:

4. Other comments

51. Do you have any remarks or would you like to draw attention to other issues?

Answer:

5. Optional: personal information – this information will be treated confidentially by the researcher and only for the purpose of organising the surveys. This does not constitute a waiver of confidentiality/anonymity.

52. Function:

53. I have years of relevant experience.

☐ I would like to receive a free summary report.

Thank you for your cooperation.

Valerie Demedts

ANNEX II INTERVIEW QUESTIONS

INTERVIEW EUROPEAN COMMISSION OFFICIALS

Introduction/cover letter

Dear Madam/Sir,

I am a University of Ghent and College of Europe alumna currently pursuing a PhD at the European Institute (Jean Monnet Centre of Excellence) of Ghent University, Belgium, under the supervision of professor Inge Govaere. My research pertains to international competition law enforcement. The aim is to investigate how the EU's dedicated competition cooperation agreements (with the US, Canada, South-Korea, Japan, and very recently the second generation agreement with Switzerland, the latter allowing the exchange of confidential information) function in practice. It is my aim to inform rule-makers on how competition authorities can further improve their cooperation processes and remain at the forefront of international competition law enforcement by combining a theoretical academic approach with insights 'from the field', via the use of interviews.

The reason I wish to engage in qualitative research is that I want to learn how different types of professionals experience the usefulness of the dedicated competition agreements in their international relations. I wish to observe how the text of the law translates in practice. I want to learn how the officials of competition agencies interact with their international counterparts on a day-to-day basis and how particular legal instruments facilitate or obstruct this.

As DG COMP negotiates the agreements studied and is one of the main implementers of such agreements, I would be very grateful if you would be willing to answer some questions regarding your daily practice or to distribute it to people that you consider suitable to provide certain insights (I am interested in the viewpoints of both case-handlers, members of Unit A5, as well as higher-level officers; they may be working on cartels, mergers, unilateral conduct, etc.). It would allow me to incorporate your very valuable opinions in my research. Feel free to choose the form of interview that would suit you best, be it by phone/Skype/in person. My contact details are provided below.

Your contribution would be a great added value to my research, as very little information is available in literature or official documents. Of course unanimity is guaranteed. No names, nor specific function-descriptions will be mentioned in the PhD, unless your explicit consent is given. I do not require case details or any form of confidential information (although suggestions of relevant case-law are welcome of course). I just wish to understand what the impact of the EU's competition cooperation agreements is in practice, and what benefits or drawbacks they offer to practitioners.

If you have any further questions, please feel free to contact me via e-mail on Valerie.Demedts@Ugent.be or by telephone on xxxxxxxxx. In case you are interested, my CV is attached to this e-mail as well to provide you some background information.

Looking forward to hearing from you,

Valerie Demedts

Interview questions: 8 main themes

Variety of legal instruments - rationale

Main Q: What do you believe is the cause of the diversification of legal instruments used for international competition law cooperation. In other words, why are political dialogues, MoUs, dedicated competition agreements, FTAs with competition provisions, etc. all used simultaneously to reach more or less the same goal?

Follow-through Q's:

- For instance, what is it exactly that makes one choose a first generation agreement over a memorandum of understanding? What are the factors at play? If the obligations contained in the first generation agreements are voluntary and dependent on the will of the parties, why then choose the form of a binding international agreement?
- Is it based on a tailoring depending on the partner country? A quote from a recent (2010) article by a commission official reads "DG Competition is now adopting a more strategic approach towards international agreements tailoring the instrument to the real needs of the relationship and to facts such as the size and importance of the country's economy, the intensity of the trade and investment relationship with the country concerned and the degree of maturity of its competition regime." What does this more strategic approach imply?
- What are the factors determining whether or not to start negotiating an agreement with a certain country?
- In theory the OECD Recommendations could serve as a sufficient legal basis for states to cooperate internationally within their national legal limits. In practice, however, the majority of OECD member states (endorsing the principles of the recommendations), that engage in international cooperation prefer to conclude bilateral agreements on the application of their respective competition laws even though the content of such agreements eventually is very similar to the recommendations. Why do you think is this the case? Why did the Commission deem it necessary to conclude bilateral agreements even after the guidelines, recommendations and best practices were in place? In other words, what is the added value?
- In the same vein: did dedicated agreements contribute to 'an atmosphere of cooperation'? The framework they create is often only a formalization of what already existed in practice. What is the added value of such formalization? Has actual change taken place during the evolution from informal cooperation to cooperation under first generation agreements, did cooperation in practice followed cooperation in theory, or did the status quo remain valid?

Main Q's on first generation dedicated agreements in particular:

Why are first generation agreements state-to-state agreements and not agency-to-agency agreements (as is the case with MoUs)?

With regard to US-EU cooperation Philip Lowe said at Fordham in 2007: "But I do not think, [...] that we would go near the idea of deference of one authority to another" Why is this?

What happens if a country does not comply with one of the binding cooperation agreements?

- What is the procedure/sanction?

- Has this ever happened before?
- can pressure be put on the parties to cooperate where they would not have done so in the absence of an agreement? i.o.w. does the added value of having a binding agreement appear from case law?

Importance/relevance of international cooperation

Concrete numbers on international competition cooperation could be found in the Commission's Annual Reports to the Council and the European Parliament on Bilateral Cooperation in Competition Policy, and in the Annual Reports on Competition Policy. However, from 2006 onwards, these reports do not longer mention any such data and according to certain scholars the Commission could not provide the information upon request. No (self)-evaluation is made possible this way. Why did the reports on the application of the agreements stop at one point? Why was it no longer considered useful to keep track of these data?

A number of quotes with regard to the relevance of international cooperation on which I would like your opinion:

- The US ICPAC report (2000) stated that “[b]ased on the evidence, recent U.S. achievements in prosecuting international cartels suggest that while foreign assistance has and can facilitate antitrust enforcement efforts, only periodically does it prove crucial to their outcome.” Would you agree with this quote today? Why?
- Similarly, in the report following the joint OECD/ICN survey on international competition cooperation of 2012 the following statement appears “It must be noted at the outset of this discussion that a large majority of respondents reported that the absence of co-operation has not hindered a case or an investigation, or that, although they could foresee difficulties, they have not encountered those difficulties in practice. Even among those respondents who reported instances where lack of co-operation hindered an investigation, one (among others) noted that “[a]lthough there have been cases in which a lack of international co-operation between agencies has hindered an investigation or prosecution, in our experience, this has rarely occurred over the past five years.”” If you agree, do you believe this justifies that cooperation should not be a priority? Why (not)?
- Or would you rather agree with the statement that “Today, more often than not, effective enforcement of national rules depends upon assistance granted by foreign agencies or states.”
- Diane Wood stated in 1999 that agencies did not need to coordinate the majority of their cases with counterparts elsewhere, but that well less than a third and maybe even less than a quarter of the cases handled by national authorities “raised even a hint of a need for international cooperation.” Would you have agreed with this statement in 1999? And today? Could you give an estimation of the percentage of total cases handled requires some form of international cooperation or coordination? It is estimated that in recent years between 30 and 50 % of DG COMP's major cases involved some form of international cooperation. Would you say that this is a correct estimation? Could you make a distinction between Merger cases, Cartel cases and Unilateral conduct cases?

Does the Commission keep statistics or data on cases with conflicting outcomes and are those being analysed?

Daily practice

How do unit A5 (International Relations) and the case handlers within DG COMP interact? What is the exact role of unit A5?

To what extent do you actively use guidelines, recommendations, best practices etcetera of the ICN/OECD/UNCTAD within DG COMP?

- Are they used more specifically when negotiating new bilateral cooperation agreements? Or would you say they rather 'lag behind'?
- Which role did/do such documents play in your opinion?

Is enhanced comity (understood here as "jurisdiction is allocated to the state whose competition regime is best equipped to establish an infringement and enforce any sanctions or remedies") used in practice (outside of the ECN of course)?

- What is your opinion about the usefulness in practice of the concept of comity in general (negative and positive) and on the concept of enhanced comity?

Do benchmarking reviews take place? Or some form of periodical self-evaluation with regard to international cooperation?

Cooperation between DG COMP and the US DOJ throughout the course of the e-books investigation, with frequent contact between investigative staffs and the senior officials, was labeled as "the first case in which the DOJ has cooperated so closely with a non-U.S. agency in a conduct investigation" (WP3 Discussion on International co-operation, United States, 8 June 2012, 7) Could you elaborate on this?

- What was in your experience the best example of international cooperation involving the EU, and why?
- If I were to choose one case-study of EU international competition cooperation, which example would you suggest? Why?
- Apart from the Boeing/McDonnell and GE/Honeywell cases, no more famous examples of conflicting cases are available. Or am I wrong?

It is often said that multilateral venues promote trust between agencies because they allow for frequent interpersonal contact. But is this trust indeed not based on *personal* relations, rather than *agency*-relations?

Strategy

What is the strategy of the Commission in establishing an external competition policy or in pursuing international cooperation? In the past it was clear that the EU pursued WTO inclusion. The current set of international instruments does not indicate a clear direction.

If the EU insisted in the past on negotiations on competition rules to which the DSM would apply (in the context of the WTO), why would it give up its position in the context of its bilateral FTAs? In other words, why are competition chapters in the EU's FTA's always excluded from the DSM?

What type (if any) of competition provisions occurs in the trade agreement that is currently negotiated with the US?

The way forward

Main Q: Where do you think the future lies for international competition cooperation (what you *hope*)? How do you see international cooperation on competition law matters evolve (what you think *reality* will be like)?

Follow-through Qs:

- Is it rather the multilateral or bilateral? Or both? Why? If both, what would the division of labour look like? How do you experience the relationship between bilateral and multilateral cooperation?
- Do you believe that there should be an increase of dedicated competition agreements (in the sense of agreements dealing only with competition matters) or should competition provisions be more integrated in broader frameworks, such as FTA's? Why?
- US officials expressed their preference for increased cooperation rather than a substantial code when responding to the Draft International Antitrust Code of the Munich Group. What is the EU's stance today?

Main Q: how will the development of private antitrust litigation in Europe affect international cooperation between antitrust agencies in your opinion?

Follow-through Q: On *Intel v. AMD*: allows to sometimes obtain discovery using U.S. civil procedure in order to support complaints before the European Commission. This summons certain questions (author: Fox).

1. Why should litigants ever be able to obtain discovery in the United States for use in a foreign proceeding when: a. such discovery could not be obtained in a similar U.S. litigation? b. such discovery would not be permitted under the discovery rules of the foreign nation? Doesn't this undermine the discovery limits imposed by that nation? Doesn't this result in U.S. litigants being treated worse than other litigants in that nation? c. the foreign tribunal states it does not want the assistance of U.S. discovery? Are parties likely to be able to get the Commission to weigh in on every U.S. discovery request made to support an EU complainant? If the EU itself invokes its right to §1782 assistance, should it categorically be given the discovery? d. the party from whom the information is sought is a defendant before the foreign proceeding and thus could be ordered to produce the relevant discovery by the foreign tribunal if it wanted it?
2. Is the Court right to treat each of the above as discretionary factors cutting against discovery rather than as a categorical bar?
3. Should the U.S. courts compel the discovery of documents to aid foreign antitrust proceedings even when those foreign nations refuse to reciprocate by compelling discovery to aid U.S. antitrust proceedings?"

Assessment

Do you think the standards for cooperation are set too low? Many problems identified 10 years ago still exist to more or less the same extent today (agreements do not contain any hard obligations,

even if the agreement itself is binding; limits on the exchange of confidential information; very little use of positive comity...)

What has been the added value of dedicated competition agreements? Are they still useful today, or is everything possible through informal daily interactions? Would you have achieved the same level of cooperation without the existence of a dedicated agreement?

What in your view is the biggest success in international competition law enforcement cooperation up to date?

Does the EU have a comparable program to the Visiting International enforcer program of the US? What is its potential? What are the limits? What do you think of such 'alternative' cooperation methods?

How would you assess the value of competition provisions in FTA's ?

Second Generation Agreements/exchange of confidential information

EU-Switzerland:

Why was opted for an agreement as the direct legal basis for the exchange of confidential information, and not legislation similar to the IAEEA in the US?

Why is the cooperation foreseen in the EU-Switzerland agreement limited to information on the Commission's file, and does it not extend to active information gathering, again in comparison to the US-Australia agreement?

Future agreements:

In what stage are negotiations on a second generation agreement with Canada and will the agreement be similar to the EU-Switzerland agreement? Can this latter agreement be considered a model for future cooperation? If not, why?

What is the stance of the EU of a second generation agreement with the US? Are steps being taken? If so, which ones? Will it be modeled on the EU-Switzerland agreement? Did the Laudati Report of 1994 prepared for this occasion ever receive any follow-up?

Are you negotiating any other second generation agreements?

On (confidential) information exchange:

Where soft instruments seem to have failed, should hard international law be developed to address the existing limits at national level to disclosure of confidential information to foreign agencies (with appropriate safeguards)?

Why do you think is the exchange of confidential information more successful or at least less controversial in areas such as tax or securities?

How would you define confidential information? Should only one definition exist? Should differing levels of protection apply to different categories of information?

In what percentage of the cases you are dealing with are you confronted with the fact that relevant information or evidence is out of reach because it is located outside your jurisdiction and there is no (sufficient) exchange of confidential information?

In what percentage of antitrust/merger cases respectively are waivers of confidentiality provided by the parties involved? Confidentiality waivers are often mentioned as *the* instrument to overcome existing legal constraints on the exchange of confidential information. Do you agree with this statement? Why (not)?

The Canadian Competition Bureau recently explored with other agencies the possibility of creating an informal information sharing network. Do you think such an initiative is necessary and would it be successful? Which impediments would exist for an electronic platform for (non-confidential) information sharing? Would an automatic exchange of information (as used in tax information exchange agreements) be a good idea? (Automatic exchange of information (also called routine exchange) involves the systematic and periodic transmission of 'bulk' taxpayer information by the source country to the residence country concerning various categories of income)

Could the formalized information sharing system within the ECN be transposed to an international context?

Miscellaneous

Any other interesting issues that come to mind or that you would like to draw attention on?

Are there any further areas that were not touched upon that you wish to comment on?

Could you refer me to other people that might be interesting to contact? Could you introduce me?

Please indicate your function within DG COMP (if it has not yet become clear via previous interaction).

INTERVIEW OECD OFFICIALS

Introduction/cover letter

Dear Madam/Sir,

I am a University of Ghent and College of Europe alumna currently pursuing a PhD at the European Institute (Jean Monnet Centre of Excellence) of Ghent University, Belgium, under the supervision of professor Inge Govaere. My research pertains to international competition law enforcement. The aim is to investigate how the EU's dedicated competition cooperation agreements (with the US, Canada, South-Korea, Japan, and very recently the second generation agreement with Switzerland, the latter allowing the exchange of confidential information) function in practice, while also assessing wider attempts towards international cooperation. It is my aim to inform rule-makers on how competition authorities can further improve their cooperation processes and remain at the forefront of international competition law enforcement by combining a theoretical academic approach with insights 'from the field', via the use of interviews.

The reason I wish to engage in qualitative research is that I want to learn how different types of professionals experience the usefulness of the dedicated competition agreements in their international relations. I wish to observe how the text of the law translates in practice. I want to learn how the officials of competition agencies interact with their international counterparts on a day-to-day basis and how particular legal instruments facilitate or obstruct this.

As the OECD has been and still is at the forefront of developing international competition law enforcement instruments via e.g. its recommendations, and is a major platform for practitioners to engage in discussion, I would be very grateful if you would be willing to answer some questions regarding your experience or to distribute it to people that you consider suitable to provide certain insights. It would allow me to incorporate your very valuable opinions as practitioners in my research. Feel free to choose the form of interview that would suit you best, be it by phone/Skype/in person. My contact details are provided below.

Your contribution would be a great added value to my research, as very little information is available in literature or official documents. Of course unanimity is guaranteed. No names, nor specific function-descriptions will be mentioned in the PhD, unless your explicit consent is given. I do not require case details or any form of confidential information (although suggestions of relevant case-law are welcome of course).

If you have any further questions, please feel free to contact me via e-mail on Valerie.Demedts@Ugent.be or by telephone on xxxxxxxx. In case you are interested, my CV is attached to this e-mail as well to provide you some background information.

Looking forward to hearing from you,

Valerie Demedts

Interview questions: 7 main themes

OECD Practice

How do all these OECD initiatives on international competition cooperation relate:

1. Global forum on competition: improving international co-operation in cartel investigations.

Resulted in: OECD Policy Roundtables: Improving international co-operation in cartel investigations 2012

2. Competition Committee WP 3 on Co-operation and enforcement: limitations and constraints to international co-operation:

3. Competition Committee WP 3 on Co-operation and enforcement: international co-operation, stocktaking exercise of the competition committee's past work.

In preparation of: Competition Committee WP 3 on Co-operation and enforcement: Report on the OECD/ICN survey on international enforcement co-operation

4. ...

Are the 1995 recommendations currently under review? What are/would be possible adaptations?

The Competition Committee stated that it would learn from example of successful international cooperation in other fields, in particular with regard to confidential information exchange. Why did it wait until now? The Laudati report for instance dates back many years already? On a related note: in which ways would competition law be different from for instance tax or securities law where successful confidential information exchange takes place?

“the Committee has never reported to the Council on the application of the 1995 Recommendation on International Co-operation and its previous iterations, and it has never reviewed the experiences of member countries with the 2005 Best Practices.” (102 icn oecd survey report) → WHY??

Do benchmarking reviews take place? Or some form of periodical self-evaluation with regard to the work that has been done on international cooperation and the follow-up it gets?

What was in your experience the best example of international cooperation, and why?

It is often said that multilateral venues promote trust between agencies because they allow for frequent interpersonal contact. But is this trust indeed based on personal relations, rather than agency-relations?

Variety of legal instruments - rationale

Main Q: What do you believe is the cause of the diversification of legal instruments used for international competition law cooperation. In other words why are political dialogues, MoUs, dedicated competition agreements, FTAs with competition provisions, etc. all used simultaneously to reach more or less the same goal?

Follow-through Q's:

- In theory the OECD Recommendations could serve as a sufficient legal basis for states to cooperate internationally within their national legal limits. In practice, however, the

majority of OECD member states(endorsing the principles of the recommendations), that engage in international cooperation prefer to conclude bilateral agreements on the application of their respective competition laws even though the content is very similar to the recommendations. Why do you think is this the case? In other words, what is the added value? Especially since the obligations contained in the first generation agreements remain voluntary and dependent on the will of the parties, why then choose the form of a binding international agreement?

- In the PhD the evolution from informal cooperation to cooperation under first generation agreements is analyzed. Has actual change taken place, and did cooperation in practice follow cooperation in theory, or did the status quo remain valid?
- Is there a main goal of international cooperation on competition law issues and if yes, what do you think it is? Or do you believe that a range of different goals is pursued?

Importance/ relevance of international cooperation

A number of quotes with regard to the relevance of international cooperation on which I would like your opinion:

- The US ICPAC report (2000) stated that “[b]ased on the evidence, recent U.S. achievements in prosecuting international cartels suggest that while foreign assistance has and can facilitate antitrust enforcement efforts, only periodically does it prove crucial to their outcome.” Would you agree with this quote today? Why?
- In the report following the joint OECD/ICN survey on international competition cooperation of 2012 the following statement appears “It must be noted at the outset of this discussion that a large majority of respondents reported that the absence of co-operation has not hindered a case or an investigation, or that, although they could foresee difficulties, they have not encountered those difficulties in practice. Even among those respondents who reported instances where lack of co-operation hindered an investigation, one (among others) noted that “[a]lthough there have been cases in which a lack of international co-operation between agencies has hindered an investigation or prosecution, in our experience, this has rarely occurred over the past five years.”” Do you believe this justifies that cooperation should not be a priority? Why?
- Or would you rather agree with the statement that “Today, more often than not, effective enforcement of national rules depends upon assistance granted by foreign agencies or states.”

The way forward

Main Q: Where do you think the future lies for international competition cooperation (what you hope)? How do you see international cooperation on competition law matters evolve (what you think reality will be like)?

- Is it rather the multilateral or bilateral? Or both? Why? If both, what would the division of labour look like?

Follow-through Qs:

- If bilateral, do you believe that there should be an increase of dedicated competition agreements (in the sense of agreements dealing only with competition matters) or should competition provisions be more integrated in broader frameworks, such as FTA’s? Why?

- How do you experience the relationship between bilateral and multilateral cooperation?

Main Q: How would/will the development of private antitrust litigation in Europe affect international cooperation between antitrust agencies?

Assessment

Do you think the standards for cooperation are set too low? Many problems identified 10 years ago are still the problems now (agreements do not contain any hard obligations, even if the agreement itself is binding; limits on the exchange of confidential information; very little use of positive comity...)

Are bilateral agreements still useful today, or is everything possible through informal daily interactions? Would the same level of cooperation be achievable without the existence of a dedicated agreement?

What in your view is the biggest success in international competition law enforcement cooperation up to date?

Do you think cooperation efforts get enough publicity? Do you think there should be more/less information about it? Are examples of successful cooperation highlighted enough to domestic constituencies? Are the benefits of cooperative efforts sufficiently demonstrated?

How would you assess the value of competition provisions in FTA's ?

Second Generation Agreements/exchange of confidential information

Where soft instruments seem to have failed, should hard international law be developed to address the existing limits at national level to disclosure of confidential information to foreign agencies?

Why is the exchange of confidential information more successful or less controversial at the least in areas such as tax or securities? Does the Committee on fiscal affairs sometimes cooperate with the competition committee? Are experiences exchanged? For instance with regard to the 2006 Manual with regard to exchange of information in tax matters?

How would you define confidential information? Should only one definition exist? Should differing levels of protection apply? According to what factors?

The Canadian delegation explained that the Canadian Competition Bureau recently explored with other agencies around the globe the possibility of creating an informal information sharing network. Do you think such an initiative is necessary and would it be successful? Which impediments would exist for an electronic platform for (non-confidential) information sharing? Would an automatic exchange of information (as used in tax information exchange agreements) be a good idea? (Automatic exchange of information (also called routine exchange) involves the systematic and periodic transmission of 'bulk' taxpayer information by the source country to the residence country concerning various categories of income)

Miscellaneous

Any other interesting issues that come to mind or that you would like to draw attention on? Are there any further areas that were not touched upon that you wish to comment on?

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